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NATIONWIDE PERSONAL JURISDICTION IN ALL FEDERAL QUESTION CASES: A NEW RULE 4

HOWARD M. ERICHSON

INTRODUCTION

Every litigator who remembers first year civil procedure knows that the personal jurisdiction¹ of federal courts is limited by state territorial boundaries.² That limitation, however, may soon disappear in federal question cases.³ A new rule of civil procedure, currently under consideration by the federal rulemakers,⁴ would provide for nationwide service of

¹ Personal jurisdiction refers to a court's power to exercise control over the parties before it. *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979); *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 857 (11th Cir. 1988). Subject matter jurisdiction, on the other hand, pertains to a court's power to hear the type of case presented. See *Murrell v. Stock Growers' Nat'l Bank*, 74 F.2d 827, 831 (10th Cir. 1934).

² See J. Cound, J. Friedenthal, A. Miller & J. Sexton, *Civil Procedure, Cases and Materials* 138 (5th ed. 1989); R. Cover, O. Fiss & J. Resnik, *Procedure* 1435 (1988); R. Field, B. Kaplan & K. Clermont, *Materials for a Basic Course in Civil Procedure* 179-80 (5th ed. 1984). Three exceptions are the "100-mile bulge" provision of Federal Rule of Civil Procedure 4(f), the use by federal courts of state long-arm statutes, and the nationwide service of process provisions appended to some federal statutes. See notes 21-34 and accompanying text *infra*.

³ Federal question cases are those civil actions brought in federal courts in which subject matter jurisdiction is premised either on the general federal question statute, 28 U.S.C. § 1331 (1982) ("all civil actions arising under the Constitution, laws, or treaties of the United States"), or on one of the specific federal question jurisdictional grants, such as 28 U.S.C. § 1334 (1982) (bankruptcy), 28 U.S.C. § 1338 (1982) (patents), and 28 U.S.C. § 1343 (1982) (civil rights). Federal subject matter jurisdiction in federal question cases is authorized by U.S. Const. art. III, § 2. See J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* § 2.3 (1985) [hereinafter Friedenthal].

⁴ "Federal rulemakers" refers to the members of the Judicial Conference's Standing Committee on Rules and the Advisory Committee on Civil Rules, on whom falls the primary responsibility for creating the Federal Rules of Civil Procedure. The creation of a federal rule of civil procedure, in accordance with the Rules Enabling Act of 1934, 28 U.S.C. § 2072 (1982), involves a series of steps taken by academics, the Supreme Court, and Congress. Officially, the rules are prescribed by the Supreme Court. In practice, however, it is the Judicial Conference, an advisory group comprised of the Chief Justice and various federal judges, that drafts the rules pursuant to 28 U.S.C. § 3771 (1982). The Judicial Conference has a Standing Committee on Rules, which in turn has an Advisory Committee on Civil Rules that is made up of judges, law professors, and practicing attorneys.

In general, a rule or amendment is initially drafted by the law professor who is serving as reporter to the Advisory Committee. It then proceeds through Advisory Committee revision, Standing Committee review, public consideration of a tentative draft, further revision, and Supreme Court approval. Before proposed rules become effective, they must be presented to Congress for review and tacit approval. See 28 U.S.C. § 2072 (1982) ("Such rules shall not take effect until they have been reported to Congress by the Chief Justice . . . , and until the

process⁵ in all federal question cases.⁶

The proposed rule would profoundly affect forum selection in the federal courts. In practice, the new rule would expand the forum and

expiration of ninety days after they have been thus reported.”). See generally W. Brown, *Federal Rulemaking: Problems and Possibilities* 5-34 (Federal Judicial Center 1981); Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. Pa. L. Rev. 2067, 2119-24 app. 2 (1989); Hazard, *Undemocratic Legislation* (Book Review), 87 Yale L.J. 1284, 1284-85 (1978) (reviewing J. Weinstein, *Reform of Court Rule-Making Procedures* (1977)). For a discussion of the history of the rulemaking process, see W. Brown, *supra*, at 1-4.

⁵ Service of process is the ritual through which a court asserts personal jurisdiction over a party. See *FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 636 F.2d 1300, 1312 n.61 (D.C. Cir. 1980); *R. Casad, Jurisdiction and Forum Selection* §§ 4:01, 4:14 (1988); 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1063 (1987). Service notifies the defendant of the commencement of an action. While a defendant's amenability to service of process does not suffice to create personal jurisdiction—the assertion of jurisdiction must also meet the requirements of due process, see note 25 *infra*—such amenability is a prerequisite to the assertion of personal jurisdiction. See *Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404, 409 (1987); *Lisak v. Mercantile Bancorp. Inc.*, 834 F.2d 668, 671 (7th Cir. 1987), cert. denied, 108 S. Ct. 1472 (1988). A federal statute or rule that provides for nationwide service of process entitles a court to assert personal jurisdiction over a defendant, subject only to constitutional limits, in any judicial district of the United States. See notes 30-34 and accompanying text *infra*.

⁶ See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure*, *Federal Rule of Civil Procedure 4(f)*, at 15-16 (Sept. 1989) (on file at New York University Law Review) [hereinafter *Proposed Amendments*].

Although this Note focuses only on the territorial limits issue, the proposed Rule 4 amendments contain a number of other interesting revisions, all designed to facilitate service of summons. See *id.* Advisory Committee Notes at 19-20. The amendments strongly encourage the use of waiver of service by shifting the cost of service to defendants who fail to comply with a request for waiver without good cause. See *id.* Rule 4(d), at 5-8. They also reduce the use of United States marshals. See *id.* Rule 4(c), at 2-5. Finally, the amendments call attention to the Hague Convention regarding service abroad and make the use of the Convention mandatory when available, see *id.* Rule 4(f)(1), at 9, but provide alternative methods for international service of summons where internationally agreed-upon means are unavailable, see *id.* Rule 4(f)(2), at 9-10.

This Note describes the proposed rule as providing “nationwide” service of process. In fact, the proposed rule would provide for service of process anywhere in the world. See *id.* Rule 4(e)-(f), at 8-10. The proposed rule's significance is due, in large part, to the impact it would have on foreign defendants. See text accompanying notes 74-77 *infra*. Because of constitutional limits on personal jurisdiction, however, worldwide service of process pursuant to the new Rule 4 would not lead to worldwide personal jurisdiction as inexorably as nationwide service of process pursuant to the new rule would lead to nationwide personal jurisdiction. This Note therefore refers to “nationwide”—rather than “worldwide”—personal jurisdiction under the new rule.

The proposal would not extend nationwide service to cases in which subject matter jurisdiction is based on diversity of citizenship. This Note, like the proposal, focuses on federal question cases. The Note's reasoning, however, could be extended to encompass certain types of diversity cases as well, particularly those where the federal courts' function is distinctly federal. See notes 281-89 and accompanying text *infra*.

joinder options available to plaintiffs in federal question cases.⁷ With nationwide service of process, assertions of jurisdiction would be possible in previously unavailable forums and over previously unavailable parties.

The new rule's impact on federal court practice would flow not only from the immediate increase in forum and joinder options, but also from its long-term effect on civil procedure doctrine. The proposed rule forces a reconsideration of the proper spheres of personal jurisdiction, venue,⁸ and forum non conveniens,⁹ and in so doing calls into question the relative weights of the two basic and often conflicting values underlying personal jurisdiction analysis: sovereignty and convenience.¹⁰ Such doctrinal purification, beyond satisfying the aesthetic sensibilities of proceduralists, brings very pragmatic benefits. Efficiency of litigation and predictability of result, for example, are enhanced by bright-line clarifications of the law.¹¹ If, as this Note argues, the new rule will help disentangle the hopelessly intertwined notions of personal jurisdiction, venue, and forum non conveniens,¹² then each of those doctrines will be better able to serve its proper function.

The disentangling of these doctrines is sorely needed. They should function as a series of filters, each straining out some inappropriate forum choices. Where the chosen court lacks power over the defendant, the personal jurisdiction filter should cause any claims against that defendant to be dismissed. If the choice passes through the personal jurisdiction filter but is in a forum legislatively deemed unlikely to be convenient, then the venue filter should cause the case to be dismissed or transferred. If the choice passes through both of these filters, but is nonetheless inconvenient (based on the case's particular facts), then the suit should be di-

⁷ See notes 84-90 and accompanying text *infra*.

⁸ Venue rules, which are legislatively determined, govern where suit may be brought within a sovereign entity. See *Denver & R.G.W.R.R. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 560 (1967). Venue is "primarily a matter of convenience of litigants and witnesses." *Id.* See *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979) (distinguishing "venue, which is primarily a matter of choosing a convenient forum," from "personal jurisdiction, which goes to the court's power to exercise control over the parties").

⁹ Forum non conveniens, a discretionary common law doctrine, permits a court to refuse to exercise its jurisdiction over an action when another forum would be more appropriate. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-09 (1947); Friedenthal, *supra* note 3, § 2.17. It is understood here to include the closely related doctrine of venue transfer pursuant to 28 U.S.C. § 1404 (1982). See *R. Casad*, *supra* note 5, § 1:07; notes 250-55 and accompanying text *infra*. Forum non conveniens and venue transfer, as devices for limiting the potential unfairness of the new Rule 4, are discussed at notes 247-61 and accompanying text *infra*.

¹⁰ See notes 161-67 and accompanying text *infra*.

¹¹ Cf. *Stouffer Corp. v. Breckenridge*, 859 F.2d 75, 77 (8th Cir. 1988) (bright-line rule "enhances predictability of result and promotes judicial economy"); Note, *The New Business Rule and the Denial of Lost Profits*, 48 Ohio St. L.J. 855, 860, 868 (1987) (goals of "certainty and judicial economy" served by all bright-line rules).

¹² See notes 209-61 and accompanying text *infra*.

verted to a more appropriate forum by the filter of forum non conveniens and venue transfer.

These "court access doctrines" do not function so neatly, however. They have come to overlap so substantially that they often fail to operate as independent filters.¹³ Personal jurisdiction and venue, for instance, are frequently described as effectuating the same policies.¹⁴ This encourages the collapse of the two filters into one,¹⁵ which decreases the ability of these doctrines to divert suits from inappropriate forums.¹⁶ Likewise, personal jurisdiction doctrine's growing concern with convenience¹⁷ makes it somewhat redundant of forum non conveniens, thus promoting judicial tolerance of each doctrine's vagueness.¹⁸ The proposed rule, by implicitly asserting that personal jurisdiction is primarily concerned with power and that convenience must be ensured by other limitations on court access, promises to assist in separating the filters so that each one can function more effectively.

If passed, the new rule would represent a dramatic departure from

¹³ See generally Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. Pa. L. Rev. 781, 786-95, 805 (1985) (discussing redundancies in subject matter jurisdiction, personal jurisdiction, venue, and forum non conveniens).

¹⁴ *Id.* at 792-93. For examples of this perception of personal jurisdiction and venue, see *Time, Inc. v. Manning*, 366 F.2d 690, 696 (5th Cir. 1966) (fairness and convenience to defendant are goals of both personal jurisdiction and venue); Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 Me. L. Rev. 41, 59 (1988) ("The policy import of venue and personal jurisdiction rules is virtually the same. Both kinds of rules regulate where an action may be brought."). The current overlap between the two doctrines is so substantial that some commentators have advocated the use of only one of the two doctrines to govern the location of federal suits. See, e.g., Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 Vand. L. Rev. 608, 628-33 (1954) (venue); Currie, *The Federal Courts and the American Law Institute*, Pt. II, 36 U. Chi. L. Rev. 268, 300 (1969) (personal jurisdiction). See also Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 Cornell L. Rev. 411, 433-34 (1981) (discussing Barrett's and Currie's proposals); Whitten, *supra*, at 59 n.80 (same).

¹⁵ See, e.g., *Fraley v. Chesapeake & O. Ry.*, 397 F.2d 1, 4 (3d Cir. 1968) (interpreting venue provision to be coincidental with amenability to service of process). Indeed, Congress has recently acted on this perception by providing that in cases where the defendant is a corporation, venue will lie wherever personal jurisdiction can be obtained. 134 Cong. Rec. S16,292 (daily ed. Oct. 14, 1988) (amendment to 28 U.S.C. § 1391(c) explicitly linking corporate venue and personal jurisdiction).

¹⁶ Regarding this effect of doctrinal redundancy, one commentator has noted:

[V]enue guidelines had little impact on the place of trial beyond that accomplished by the limitations imposed by personal jurisdiction. This redundancy was exacerbated as courts reinterpreted statutory venue requirements in the wake of *International Shoe Co. v. Washington* to account for expanded conceptions of permissible personal jurisdiction. The definition of "residence" in the venue statute was interpreted to be consistent with amenability to process under long-arm statutes, so that venue was rarely an independent limitation on a plaintiff's choice of forum.

Stein, *supra* note 13, at 801 (footnotes omitted).

¹⁷ See notes 141-46 and accompanying text *infra*.

¹⁸ See Stein, *supra* note 13, at 805.

current law. The current Rule 4 generally limits the jurisdictional reach of a federal district court to a range no greater than that of a court of the state in which that district court sits;¹⁹ the federal court generally cannot extend its reach beyond state territorial boundaries unless state law allows it.²⁰ The new Rule 4 would, for purposes of federal court personal jurisdiction in federal question cases, erase those state boundaries.

This Note argues in favor of the adoption of the new Rule 4's nationwide personal jurisdiction provision. Not only would the new Rule 4 be a legitimate exercise of authority, but it might result ultimately in a decrease in litigational inconvenience, which would inure to the benefit of defendants as well as plaintiffs. Finally, using the proposed rule as a springboard to discuss the confused state of current court access doctrine, this Note urges the adoption of more rational and clearly defined distinctions in civil procedure.

Part I of this Note analyzes the proposed rule's nationwide service of process provision. After comparing the operation of the current Rule 4 to the proposed Rule 4, it describes the practical benefits the new rule would bring, particularly judicial economy and more vigorous enforcement of federal law. It then identifies the class of cases the new rule would affect, concluding that while the new rule would make personal jurisdiction obtainable in many more forums than before, venue restrictions would sharply limit the new rule's practical impact on where suits could actually be brought. Part II addresses the criticisms to which the proposed rule seems most vulnerable. The rule might be challenged as a violation of the due process limitations on personal jurisdiction or as an endeavor beyond the scope of the rulemakers' authority. Even if it is constitutional and a valid exercise of authority, the proposal might be challenged as a bad idea, on the ground that expansions of jurisdictional reach cause inconvenience and unfairness to defendants. These objections, Part II argues, prove unpersuasive, though the proposed rule would engender certain problems of inconvenience and unfairness to defendants. In particular, the new rule might enable plaintiffs to harass defendants by bringing suit in inconvenient forums.

Part III proposes a response to the new rule's problems. The proposed rule, Part III argues, will help separate the currently overlapping doctrines of personal jurisdiction, venue, and *forum non conveniens*, thus enabling those doctrines to filter out inappropriate choices of forum more effectively. Much of the potential unfairness engendered by the new rule could be prevented by the adoption of restrictive, defendant-oriented

¹⁹ See Fed. R. Civ. P. 4(e)-(f).

²⁰ *Id.* Two exceptions are the "100-mile bulge" and statutory nationwide service provisions. See notes 26-34 and accompanying text *infra*.

venue provisions, and by the vigorous use of venue transfer and forum non conveniens. Finally, Part IV discusses the new rule's broader implications for the future, concluding that the proposal heralds a step toward greater rationality in civil procedure doctrine.

I

A NEW RULE 4

A. *The Current Rule 4*

Under the current Rule 4 of the Federal Rules of Civil Procedure, federal courts generally mimic state courts for purposes of jurisdictional reach.²¹ Rule 4(f) provides that "the territorial limits of the state in which the district court is held" define the usual scope of effective service of process.²² Rule 4 thus dictates that a federal court, like the courts of the state in which it sits, may assert jurisdiction over any in-state defendant. Rule 4(e) allows a federal court to employ the long-arm provisions²³ of the state in which it sits.²⁴ For purposes of asserting jurisdiction over out-of-state defendants as well, then, federal courts behave like state courts.²⁵

Two exceptions in which a federal court may reach farther in asserting jurisdiction than may a state court are worth noting. First, Rule 4(f) provides for a "one hundred mile bulge"²⁶ in certain cases. In those situations, the federal court may serve process on a defendant who is out of state but within one hundred miles of the courthouse. However, the bulge provision applies only to parties impleaded pursuant to Rule 14²⁷

²¹ See Fed. R. Civ. P. 4(e)-(f).

²² *Id.* Rule 4(f).

²³ Long-arm statutes, also called specific act statutes, predicate personal jurisdiction over a nonresident defendant on the defendant's contacts with the forum when those contacts give rise to the cause of action. Such contacts may include tortious acts, property ownership, or business transactions. See Friedenthal, *supra* note 3, § 3.12.

²⁴ Fed. R. Civ. P. 4(e). See *Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404, 411 (1987); *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 847 (11th Cir. 1988).

²⁵ See *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1265-66 (5th Cir. 1983) (construing Rule 4 to mean that where assertion of jurisdiction depends on state statute, federal court can reach only those defendants a state court could reach, even in a federal question case).

Personal jurisdiction in the state courts requires not only that the defendant be amenable to service of process, but also that the defendant have "minimum contacts" with the forum state sufficient to meet the requirements of due process. See notes 141-46 and accompanying text *infra*. In a case in federal court, if personal jurisdiction is premised through Rule 4(e) on a state statute, the federal court applies the same minimum contacts analysis that a state court would apply. See *DeMelo*, 711 F.2d at 1265-66.

²⁶ See 4 C. Wright & A. Miller, *supra* note 5, § 1127; Fed. R. Civ. P. 4(f).

²⁷ Impleader refers to a claim brought by a defendant against a third party who is or may be liable to the defendant if the defendant is held liable to the plaintiff. See Fed. R. Civ. P. 14; *Tate v. Frey*, 735 F.2d 986, 988-89 (6th Cir. 1984).

or brought in as necessary parties pursuant to Rule 19.²⁸ Moreover, because the bulge reaches only one hundred miles from the courthouse, its practical relevance is confined primarily to cases brought in districts within interstate metropolitan areas such as that surrounding New York City. The bulge provision is thus limited both in legal scope and in geographical reach.

Second, Rule 4(f) allows a federal court to serve process on a defendant beyond the state's boundaries "when authorized by a statute of the United States."²⁹ This links Rule 4 to the nationwide service of process provisions included in a number of federal statutes.³⁰ The Securities Act of 1933 and the Sherman Act, for example, provide for nationwide service of process in certain cases.³¹ Such provisions are potentially unlimited in reach; they allow a federal court to assert jurisdiction over a party

²⁸ A necessary party is a party that must be brought in as a defendant in a pending action if it is feasible to bring in that party. See Fed. R. Civ. P. 19; *West Coast Exploration Co. v. McKay*, 213 F.2d 582, 592-93 (D.C. Cir.), cert. denied, 346 U.S. 989 (1954). The bulge provision thus does not apply to original defendants; only those brought in later, as third party defendants or as necessary parties, are subject to that provision.

²⁹ Fed. R. Civ. P. 4(f). See *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 847 (11th Cir. 1988).

³⁰ Congress's power to authorize extraterritorial service of process is well accepted. See *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 442 (1946); *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838); Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 Vill. L. Rev. 1, 1-2 (1988). See also *Robertson v. Railroad Labor Bd.*, 268 U.S. 619, 622 (1925) (dictum), appeal dismissed, 273 U.S. 770 (1926).

Nationwide service of process is authorized by the following federal statutory provisions: *Commodity Exchange Act*, 7 U.S.C. §§ 13a-1, 13a-2(4), 18(b) (1982); *Arbitration Act* award confirmation, 9 U.S.C. § 9 (1982); *Sherman Act*, 15 U.S.C. § 5 (1982); antitrust actions against corporations, 15 U.S.C. § 22 (1982); *Clayton Act*, 15 U.S.C. § 25 (1982); *Federal Trade Commission administrative subpoenas*, 15 U.S.C. § 49 (1982); *Securities Act of 1933 and Securities Exchange Act of 1934*, 15 U.S.C. §§ 77v(a), 78aa (1982); *Public Utility Holding Company Act of 1935*, 15 U.S.C. § 79y (1982); *Investment Company Act of 1940*, 15 U.S.C. § 80a-43 (1982); *Investment Advisers Act of 1940*, 15 U.S.C. § 80b-14 (1982); *Racketeer Influenced and Corrupt Organizations Act*, 18 U.S.C. § 1965 (1982); *interpleader*, 28 U.S.C. §§ 1335, 1397, 2361 (1982); *civil action against U.S. officer acting in official capacity*, 28 U.S.C. § 1391(e) (1982); *lien enforcement*, 28 U.S.C. § 1655 (1982); *receiver property actions*, 28 U.S.C. § 1692 (1982); *shareholder actions*, 28 U.S.C. § 1695 (1982); *interstate commerce laws*, 28 U.S.C. § 2321 (1982), 49 U.S.C. §§ 1001 et seq. (1982).

Under many of these statutes, application of nationwide service of process is subject to restrictions. See note 33 *infra*. For another listing of statutes authorizing nationwide service of process, see *Berger, Acquiring in Personam Jurisdiction in Federal Question Cases: Procedural Frustration Under Federal Rule of Civil Procedure 4*, 1982 Utah L. Rev. 285, 318-19 n.157.

When federal court personal jurisdiction is premised on a nationwide service of process provision, the appropriate minimum contacts test for the constitutionality of that assertion of jurisdiction, see note 25 *supra*, is not to measure the defendant's contacts with the state in which the district court sits, but rather to measure the defendant's aggregate contacts with the nation as a whole. See notes 149-60 and accompanying text *infra*.

³¹ See 15 U.S.C. § 77v(a) (1982) (*Securities Act*); 15 U.S.C. § 5 (1982) (*Sherman Act*).

found in any judicial district of the United States.³² However, the fact that they are appended to specific substantive statutes and applicable only when those statutes are being enforced limits their scope.³³ Indeed, these substance-specific nationwide service provisions are used only to facilitate the achievement of particularly weighty federal policy goals.³⁴

Omni Capital International v. Rudolf Wolff & Co.,³⁵ which brought nationwide service of process to the attention of the Supreme Court, provides a useful illustration of Rule 4's operation. In that case, each service route allowed by Rule 4 failed to reach the third party defendants. A private action under the Commodity Exchange Act,³⁶ the suit was brought in a Louisiana federal district court by investors against Omni Capital International, Ltd. and Omni Capital Corporation (collectively "Omni"), New York corporations that marketed a commodities futures investment program.³⁷ Omni impleaded Rudolf Wolff & Co., a British corporation employed by Omni to handle trades on the London Metals Exchange, and James Gourlay, a British citizen who, as Wolff's representative, solicited Omni's business.³⁸ Wolff and Gourlay moved to dismiss the claims against them for lack of personal jurisdiction.³⁹ The district court determined that the requirements of service of process were not met and dismissed the claims.⁴⁰ The Fifth Circuit affirmed,⁴¹ and the

³² See, e.g., 15 U.S.C. § 77v(a) (1982) ("process . . . may be served in any . . . district of which the defendant is an inhabitant or wherever the defendant may be found"); id. § 5 ("[T]he court may cause [parties who, in the interest of justice, should be brought before the court] to be summoned, whether they reside in the district in which the court is held or not."). Limits based on venue restrictions, however, still apply. See notes 122-25 and accompanying text *infra*.

³³ The scope of these statutory nationwide service of process provisions is further limited by internal constraints on the application of many of them. See, e.g., Sherman Act, 15 U.S.C. § 5 (1982) (nationwide service of process provision applies only if court finds "that the ends of justice require that other parties should be brought before the court"); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1965 (1982) (nationwide service of process provision applies only if "the ends of justice require that other parties residing in any other district be brought before the court").

³⁴ See Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 Va. L. Rev. 1183, 1243 (1987). "In stark contrast to the general drift of the case law [imposing limits on the territorial reach of service of process]," Sinclair explains, "the several statutes authorizing nationwide service in specific instances may be seen as rare instances of express authority enacted to achieve goals perceived as paramount." *Id.*

³⁵ 108 S. Ct. 404 (1987).

³⁶ 7 U.S.C. §§ 1 et seq. (1982 & Supp. V 1987).

³⁷ *Omni*, 108 S. Ct. at 407.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 408.

⁴¹ *Point Landing, Inc. v. Omni Capital Int'l*, 795 F.2d 415 (5th Cir. 1986), *aff'd sub nom. Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404 (1987).

Supreme Court granted certiorari.⁴² To determine whether service of process was authorized, the Court turned to Rule 4.⁴³

Wolff and Gourlay were not present in Louisiana,⁴⁴ so Rule 4(f)'s allowance of service on parties present within the forum state's territorial boundaries could not be used.⁴⁵ Nor were they found within one hundred miles of the courthouse, frustrating any use of Rule 4(f)'s "bulge" provision.⁴⁶ Service under the state's long-arm statute, as allowed by Rule 4(e),⁴⁷ failed as well, because the Louisiana long-arm statute⁴⁸ did not reach the defendants.⁴⁹ Therefore, service and personal jurisdiction could only have been achieved by using a particular federal statutory service provision.⁵⁰ But while the Commodity Exchange Act provides for nationwide service of process in certain types of actions, it does not do so for private actions,⁵¹ either implicitly or explicitly.⁵² As a result, the federal statute route to service under Rule 4 was no more successful than any of the other avenues. Rule 4 thus provided no effective means for serving a summons on the third party defendants.⁵³

Omni attempted to circumvent Rule 4's limitations on service of process by urging the Court to authorize extraterritorial service as a matter of federal common law.⁵⁴ The Court, however, declined to do so⁵⁵ and held jurisdiction unobtainable over the foreign third party defendants.⁵⁶

As is clear from *Omni*, Rule 4, to a large extent, requires a federal court to mimic a court of the state in which it is located—a requirement not easily circumvented. State territorial boundaries therefore loom large whenever a plaintiff in federal court attempts to serve a defendant with a summons.

⁴² *Omni Capital Int'l v. Rudolf Wolff & Co.*, 479 U.S. 1063 (1987).

⁴³ *Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404, 409-11 (1987).

⁴⁴ *Id.* at 407.

⁴⁵ See *id.* at 409-10. The Court, of course, made no reference to any attempt to serve process within Louisiana's borders.

⁴⁶ See *id.* at 407. Because Wolff and Gourlay were impleaded pursuant to Rule 14, the bulge provision was potentially applicable. See text accompanying notes 26-28 *supra*. The Court did not mention any attempt to serve process pursuant to the bulge provision.

⁴⁷ See text accompanying notes 23-25 *supra*.

⁴⁸ La. Rev. Stat. Ann. § 13:201 (West 1968) (current version at La. Rev. Stat. Ann. § 13:3201 (West Supp. 1989)).

⁴⁹ *Omni*, 108 S. Ct. at 411.

⁵⁰ See text accompanying note 29 *supra*. Both Rule 4(e) and Rule 4(f) authorize the use of federal statutory service provisions. See Fed. R. Civ. P. 4(e)-(f).

⁵¹ See, e.g., 7 U.S.C. §§ 13a-1, 13a-2(4) (1982 & Supp. V 1987).

⁵² *Omni*, 108 S. Ct. at 410-11.

⁵³ *Id.* at 409-11, 413.

⁵⁴ *Id.* at 409.

⁵⁵ *Id.* at 411-13.

⁵⁶ *Id.* at 413.

The result in *Omni* is problematic. Foreign defendants doing business in the United States were in that case held unamenable to service and thus unaccountable in the United States for alleged violations of federal law. The Court was not unsympathetic to this problem⁵⁷ and in fact commented on the need for nationwide jurisdiction in at least certain federal question cases.⁵⁸ While acknowledging the strong policy reasons for asserting jurisdiction through nationwide service of process, however, the Court held that such service was invalid in the absence of a specific rule or statute.⁵⁹ "It is not for the federal courts . . . to create such a rule [authorizing nationwide service] as a matter of common law," the Court wrote. "That responsibility, in our view, better rests with those who propose the Federal Rules of Civil Procedure and with Congress."⁶⁰ By calling attention to the need and then declining to satisfy it, the Court conveniently passed the buck.

The buck, it seems, stops with the federal rulemakers. Frankly acknowledging the influence of the Supreme Court dictum,⁶¹ the Advisory Committee on Civil Rules⁶² drafted a new Rule 4.⁶³

B. Rule 4 as Proposed

1. Content of the Proposed Rule⁶⁴

The revision of Rule 4 proposed by the Advisory Committee on the Federal Rules of Civil Procedure would change dramatically the territorial limits of effective federal court service of process. First, the proposed revision eliminates entirely sections 4(e) and 4(f) as they now stand. In

⁵⁷ "We are not blind to the consequences of the inability to serve process," the Court wrote. *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* The Court's suggestion that a federal rule of civil procedure could allow nationwide long-arm jurisdiction was dictum. See Whitten, *supra* note 14, at 103 n.275. Nevertheless, the current activity of the federal rulemakers indicates that the rulemakers take the dictum seriously.

⁶¹ See Proposed Amendments, *supra* note 6, Advisory Committee Notes at 30; Reporter's Draft of Rule 4, 10-1-88, Reporter's Note at 1, Advisory Committee Notes at 28 (on file at New York University Law Review) [hereinafter Reporter's Draft].

⁶² The advisory committee serves the Judicial Conference's Standing Committee on Rules. Comprised of judges, law professors, and practicing attorneys, the advisory committee considers and revises drafts of proposed rules. See W. Brown, *supra* note 4, at 5-6, 9-25; Hazard, *supra* note 4, 1284, 1284-85. For a general description of the rulemaking process, see note 4 *supra*. The current committee members are listed in 4 C. Wright & A. Miller, *supra* note 5, § 1007.

⁶³ See Proposed Amendments, *supra* note 6, Rule 4, at 1-19. For a discussion of Rule 4 as it stands now, see notes 21-34 and accompanying text *supra*.

⁶⁴ For a discussion of an earlier draft of the proposed Rule 4, written by the rule's drafter, see generally Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 *Notre Dame L. Rev.* 733 (1988).

their stead, the proposed rule puts forth three basic ideas.⁶⁵

First, the new rule preserves the one-hundred mile bulge for actions under Rules 14 and 19.⁶⁶ Second, in actions other than federal question and interpleader cases,⁶⁷ it explicitly links federal court personal jurisdiction to state court personal jurisdiction by providing that the federal court may assert jurisdiction only when the corresponding state court would be empowered to do so.⁶⁸

Finally, and most importantly, the new rule permits nationwide service of process in all federal question cases.⁶⁹ Specifically, it provides:

Unless a statute of the United States otherwise provides, or the Constitution in a specific application otherwise requires, service of a summons or filing of a waiver of service is also effective to establish jurisdiction over the person of any defendant against whom is asserted a claim arising under federal law.⁷⁰

If passed, this section will allow federal courts to assert personal jurisdiction in federal question and interpleader cases⁷¹ over any defendant

⁶⁵ The relevant text of the proposed rule reads as follows:
RULE 4 SUMMONS

...

(I) Territorial Limits of Effective Service.

(1) [S]ervice of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant who

(A) could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is held, or

(B) is a party joined under Rule 14 or Rule 19 and served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or

(C) is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335.

(2) Unless a statute of the United States otherwise provides, or the Constitution in a specific application otherwise requires, service of a summons or filing of a waiver of service is also effective to establish jurisdiction over the person of any defendant against whom is asserted a claim arising under federal law.

Proposed Amendments, *supra* note 6, Rule 4(I), at 14-16.

⁶⁶ See Proposed Amendments, *supra* note 6, Rule 4(I)(1)(B), at 15.

⁶⁷ What remains are all non-interpleader cases where subject matter jurisdiction is based on diversity of citizenship. See 28 U.S.C. § 1332 (1982) (providing for subject matter jurisdiction in diversity cases). Interpleader is a technique designed to prevent multiple liability by which a debtor may require two or more adverse claimants to litigate their claims to the debt. See 28 U.S.C. § 1335 (1982); *Dakota Livestock Co. v. Keim*, 552 F.2d 1302, 1303, 1306 (8th Cir. 1977).

⁶⁸ See Proposed Amendments, *supra* note 6, Rule 4(I)(1)(A), at 15.

⁶⁹ *Id.* Rule 4(I)(2), at 15-16.

⁷⁰ *Id.*

⁷¹ Nationwide service of process for interpleader is not a new development. Since 1917, the Federal Interpleader Act, Act of February 22, 1917, ch. 113, 39 Stat. 929 (1917), codified as amended at 28 U.S.C. §§ 1335, 1397, 2361 (1982), has provided for such service. See *R. Casad*, *supra* note 5, at § 3:27; 4 C. Wright & A. Miller, *supra* note 5, at § 1701. For a discussion of nationwide service of process in interpleader cases, see Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 Nw. U.L. Rev. 1, 65-66 (1984).

found anywhere in the United States. The new rule provides that "service of a summons . . . [is] effective to establish jurisdiction over the person."⁷² Service pursuant to the new rule, in turn, can be achieved "in any judicial district of the United States."⁷³ When read together, these sections establish nationwide personal jurisdiction in all federal question cases.

The proposed rule also facilitates overseas service. Whereas the current Rule 4 limits service outside the United States to cases in which such service is authorized by state or federal law,⁷⁴ the new rule would allow service abroad even in the absence of such statutory authorization.⁷⁵ Moreover, the new rule allows service in a foreign country even when internationally agreed-upon means of service fail or are unavailable.⁷⁶ The proposed Rule 4 would thus serve as a federal long-arm statute for

⁷² See Proposed Amendments, *supra* note 6, Rule 4(l)(2), at 15-16.

⁷³ *Id.* Rule 4(e), at 8; *id.* Rule 4(h), at 11. The relevant text pertaining to service upon individuals reads as follows:

(e) Service upon Individuals within a Judicial District of the United States. Unless otherwise provided by federal law, service upon an individual . . . may be effected in any judicial district of the United States:

(1) pursuant to the law of the State in which the district court is held, or in which service is effected, . . . ; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode . . . or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Id. Rule 4(e), at 8-9.

The section governing service upon corporate defendants similarly allows nationwide service:

(h) Service upon Corporations and Associations. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name . . . shall be effected

(1) in a judicial district of the United States in the manner prescribed for individuals by paragraph (e)(1) of this rule or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process

Id. Rule 4(h), at 11.

⁷⁴ See Fed. R. Civ. P. 4(i).

⁷⁵ See Proposed Amendments, *supra* note 6, Rule 4(f), at 9-10. See also *id.* Advisory Committee Notes at 26 (comparing overseas service provisions of current and proposed rules).

⁷⁶ *Id.* Rule 4(f), (h), at 9-11. The relevant text reads as follows:

(f) Service upon Individuals in a Foreign Country. Unless otherwise provided by federal law, service upon an individual . . . may be effected in a foreign country:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, provided, however, that, if service is not effected within six months from the date on which the assistance of the government of the foreign country was requested pursuant to the applicable treaty or convention, service may be effected as directed by the court; or

(2) if internationally agreed means of service are unavailable, provided that service

obtaining personal jurisdiction over foreign defendants.⁷⁷

The preliminary draft of the Rule 4 revision is preceded by an interesting note from the Advisory Committee.⁷⁸ First, the prefatory Note calls attention to the severability of paragraph (1)(2)—the nationwide personal jurisdiction provision—from the remainder of the revised rule, so that Congress can disapprove that provision while still approving the many other Rule 4 amendments.⁷⁹ Second and more significantly, the Note recommends that if Congress does not disapprove paragraph (1)(2), then Congress should amend the federal question jurisdiction statute⁸⁰ to include a similar provision:

If this addition [paragraph (1)(2)] is not disapproved by Congress, it is recommended that an amendment should be made to 28 U.S.C. § 1331, adding words as follows: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States and, unless the Constitution in a specific application otherwise requires, jurisdiction over the person of defendants in such actions."⁸¹

This surprising preface to the proposed rule reflects the Advisory Committee's awareness of the fundamental nature of their revision.⁸² The

is reasonably calculated to give notice:

- (A) in the manner prescribed by the law of the foreign country . . . ; or
- (B) as directed by the foreign authority . . . ; or
- (C) unless prohibited by the law of the foreign country, by
 - (i) delivery to the individual personally . . . ; or
 - (ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or
 - (iii) diplomatic or consular officers . . . ; or
- (D) if there is no lawful means by which service can be effected in the foreign country, such means as the court shall direct.
- . . .
- (h) Service upon Corporations and Associations. . . .
 - (2) in a foreign country in the manner prescribed for individuals by paragraph (f)(1) or subparagraphs (f)(2)(A), (B) or (D) of this rule.

Id.

⁷⁷ See Reporter's Draft, *supra* note 61, Advisory Committee Notes at 25.

Given the substantial increase in the number of international transactions and events that are the subject of litigation in federal courts, it is appropriate now to infer a general legislative authority to use familiar methods of service on defendants abroad, at least in federal question cases. The considerations supporting the use of nationwide service of process in such cases are equally applicable where an alleged wrongdoer is abroad.

Id. On the distinction between worldwide and nationwide personal jurisdiction, see note 6 *supra*.

⁷⁸ See Proposed Amendments, *supra* note 6, Note at 1.

⁷⁹ "If paragraph (1)(2) of the proposed revision of Rule 4 is disapproved by the Congress, it is nevertheless recommended that the rule be approved with the deletion of the paragraph, which is separable from the revised rule . . ." Id.

⁸⁰ 28 U.S.C. § 1331 (1982).

⁸¹ Proposed Amendments, *supra* note 6, Note at 1.

⁸² An earlier draft of the new rule proposed that the Advisory Committee make its recom-

desired method of enacting nationwide personal jurisdiction, according to the rulemakers, is through congressional statutory amendment.⁸³

The new rule, in sum, would result in a dramatic expansion of amenability to service of process. This expansion, in turn, would provide important practical benefits.

2. *Practical Benefits of the Proposed Rule*

The new rule would facilitate the capture of personal jurisdiction over defendants in three situations. The first is where a defendant is not amenable to service of process in a given forum under a service provision linked to state court service.⁸⁴ In the second, a defendant has little or no contact with the forum state. In such a situation, a due process test fo-

mentation of the nationwide personal jurisdiction provision *contingent upon* Congress's amending 28 U.S.C. § 1331 to include a similar provision. See Reporter's Draft, *supra* note 61, at 16 n.1. The notes to that draft explained: "Because this [nationwide personal jurisdiction] effect has general consequences for the enforcement of federal law, it is proposed that one sentence of the revised rule be enacted by Congress as an amendment to 28 U.S.C. 1331." *Id.*, Advisory Committee Notes at 20.

Essentially, the earlier caveat amounted to a request for Congress to make its assent explicit, rather than tacit, as is the case for federal rulemaking generally. See note 4 *supra*. The unusual call for explicit congressional approval in the earlier draft seemed to be driven by a concern on the part of the rulemakers that so fundamental a rule may exceed their authority under the Rules Enabling Act, 28 U.S.C. § 2072 (1982). For a discussion of whether the current proposal for nationwide personal jurisdiction exceeds the rulemakers' power, see text accompanying notes 192-206 *infra*.

⁸³ If Congress fails to amend 28 U.S.C. § 1331 as the rulemakers desire and disapproves proposed paragraph (I)(2), but otherwise does not act to defeat the proposed Rule 4 amendments, then the new Rule 4 would become effective with paragraph (I)(2) omitted. See Proposed Amendments, *supra* note 6, Note at 1. While the language in sections 4(e) and 4(h) would still authorize nationwide service of process, such service would not necessarily suffice to create personal jurisdiction, because section 4(I)(1) states that service of a summons is "effective to establish jurisdiction over the person of a defendant" only if the defendant "could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is held," or if the defendant fits within the bulge or interpleader exceptions. Proposed Amendments, *supra* note 6, Rule 4(I)(1), at 15.

Even if section 4(I)(2) were not approved, the remainder of the new rule would offer a worthwhile clarification of federal practice in the service of summons, in that it offers a more readable, coherent set of service provisions and makes service easier than under the current Rule 4. See note 6 *supra*. It would not, however, represent a fundamental change in the relationship between the state and federal courts. See notes 275-90 and accompanying text *infra*.

If, on the other hand, Congress fails to amend 28 U.S.C. § 1331 but does not disapprove proposed paragraph (I)(2) or the remainder of the proposed Rule 4 amendments, then the new Rule 4 would become effective complete with its nationwide personal jurisdiction provision. The enactment of a nationwide personal jurisdiction rule with only tacit congressional approval, however, may test the bounds of the rulemakers' authority under the Rules Enabling Act. See note 82 *supra*; text accompanying notes 192-206 *infra*.

⁸⁴ For example, the defendant might not be found within the state where the district court sits, and there might be no applicable state long-arm statute. See text accompanying notes 22-25 *supra*.

cused on state boundaries would preclude the assertion of personal jurisdiction.⁸⁵ A court might nonetheless obtain personal jurisdiction under the "aggregate contacts" due process test applicable under the new Rule 4.⁸⁶ Facilitating the assertion of personal jurisdiction in these two situations is particularly important where a plaintiff asserts related claims against several defendants, not all of whom would normally be subject to jurisdiction in any one forum.⁸⁷

The third situation where the new rule's importance manifests itself is where a foreign defendant lacks minimum contacts with any particular state, but has ample aggregate contacts with the United States as a whole.⁸⁸ A foreign corporation, for example, might do business in the United States, but have that business spread thinly throughout the coun-

⁸⁵ See text accompanying notes 142-46 *infra*.

⁸⁶ For a discussion of the "aggregate contacts" test for the constitutionality of assertions of personal jurisdiction, see text accompanying notes 149-60 *infra*.

⁸⁷ See, e.g., *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 857 (11th Cir. 1988) (allowing jurisdiction over corporate defendant charged with antitrust violations, but only over one of two individual defendants); *Does 1-60 v. Republic Health Corp.*, 669 F. Supp. 1511, 1517-18 (D. Nev. 1987) (allowing jurisdiction over all members of nationwide RICO conspiracy pursuant to 18 U.S.C. § 1965(b) because it was undisputed that there was at least one defendant over which court had personal jurisdiction and no federal district in which court would have personal jurisdiction over all defendants); *Seahorse Boat & Barge Corp. v. Jacksonville Shipyards*, 617 F.2d 396, 397 (5th Cir. 1980) (dismissing suit as to one of multiple defendants for lack of personal jurisdiction). See also notes 283-89 and accompanying text *infra* (regarding proposal for nationwide service of process in multiparty, multiforum cases). Cf. *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486, 505 n.4 (1968) ("In these circumstances, it would be senseless to permit parties seeking to challenge the merger and the inclusion orders to bring numerous suits in many different courts."); *CAT Aircraft Leasing, Inc. v. Cessna Aircraft Co.*, 650 F. Supp. 57, 61 (D.V.I. 1986) (judicial policy favors litigating related claims in same court).

⁸⁸ See *Point Landing, Inc. v. Omni Capital Int'l*, 795 F.2d 415, 426 (5th Cir. 1986) (suggesting third party defendants lacked minimum contacts with any single state but had sufficient contacts with entire nation), *aff'd sub nom. Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404 (1987); *id.* at 428 (Wisdom, J., concurring in part and dissenting in part) (same).

According to the Advisory Committee Notes, the problem presented when defendants have contacts spread thinly throughout the nation was part of the motivation for the Rule 4 proposal.

This subdivision corrects a hiatus in the enforcement of federal law. Under the former rule, a problem was presented when the defendant was a non-resident of the United States having contacts with the United States sufficient to justify the application of United States law and to satisfy federal standards of forum selection, but having insufficient contact with any single state, or at least with the state in which the district court sat, to support jurisdiction under state long-arm legislation or meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction. In such cases, the defendant was shielded from the enforcement of federal law by the fortuity of a favorable limitation on the power of state courts which was incorporated into the federal practice by the former rule. In this respect, the revision responds to the suggestion of the Supreme Court made in *Omni Capital Intern. v. Rudolf Wolff & Co., Ltd.*, 108 S. Ct. 404, 411 (1987).

Proposed Amendments, *supra* note 6, Advisory Committee Notes at 30.

try. In such a case, no single state exists where that corporation's contacts are more than negligible, so personal jurisdiction in the United States cannot be held constitutional under a state-linked due process test.⁸⁹ It could, however, be held constitutional under the aggregate contacts test generally applied where personal jurisdiction is premised on a nationwide service of process provision.⁹⁰ The new rule would thus allow assertions of jurisdiction over certain previously immune defendants.

The rule also enhances the federal government's regulatory power by increasing the power of the judicial system to enforce federal law. The vindication of federal policy was a prime rationale behind federal question subject matter jurisdiction.⁹¹ Expansive personal jurisdiction in federal question cases is thus consonant with the federal question jurisdictional grant, which attempts to provide an initial national forum for effectuating national policy.⁹²

The Supreme Court in *Omni*, while refusing to create a nationwide service rule as a matter of common law, suggested this very concern. "A narrowly tailored service of process provision," the Court wrote, "authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable state long-arm statute, might well serve the ends of the [Commodity Exchange Act] and other federal statutes."⁹³ Although the Court seems not to have envisioned so sweeping a change as the proposed Rule 4, it did take notice of the regulatory concerns underlying such a provision.

Finally, by facilitating assertions of jurisdiction over foreign corporate defendants, the rule decreases jurisdictional trade disadvantages for domestic corporations. American businesses can rarely avoid being subject to personal jurisdiction in American courts, while foreign businesses are able to do so more frequently.⁹⁴ This increases the litigation costs

⁸⁹ See text accompanying notes 142-46 *infra*.

⁹⁰ See text accompanying notes 149-60 *infra*.

⁹¹ See Mishkin, *The Federal "Question" in the District Courts*, 53 *Colum. L. Rev.* 157, 159 (1953).

⁹² Cf. *Point Landing, Inc. v. Omni Capital Int'l*, 795 F.2d 415, 427-28 (5th Cir. 1986) (Wisdom, J., concurring in part and dissenting in part) ("I cannot understand the rationale for imposing state legislative and territorial restraints on federal courts in a federal question case involving a national policy, such as that embodied in the Commodities Exchange Act, calling for national uniformity in enforcement."), *aff'd sub nom. Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404 (1987).

⁹³ *Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404, 413 (1987).

⁹⁴ As Judge Wisdom noted when the *Omni* case was at the circuit court level, "the effect of the majority's decision is to grant jurisdictional immunity to alien defendants who have done business in this country thereby destroying any real possibility of holding them accountable for their violation of federal statutes." *Point Landing*, 795 F.2d at 427 (Wisdom, J., concurring in part and dissenting in part).

(including costs of judgments, settlements, and attorneys' fees) of domestic companies relative to the costs of foreign companies. As a result, domestic companies are put at a comparative disadvantage in international trade.⁹⁵

3. *Cases Affected by the Proposed Rule*

The new rule would affect those federal question cases not already covered by nationwide service provisions where the defendant is servable by and only by nationwide service of process. This general classification of cases affected by the new rule can best be demonstrated by process of elimination.

First, the class of cases affected must exclude cases not arising under federal law, since by its own terms the rule applies only to federal question cases.⁹⁶ Second, the class must exclude cases in which nationwide service is already authorized by statute, since in those cases the rule contributes nothing new.⁹⁷ Third, the class must exclude those cases in which the defendant is already amenable to service of process under the current provisions of Rule 4, that is, present within the state boundaries, reachable under the state long-arm statute, or servable pursuant to the one-hundred mile bulge provision.⁹⁸ In those cases as well, the rule is unnecessary. Finally, the class must exclude cases in which the court is unable constitutionally to assert personal jurisdiction over the relevant party, even under a nationwide service provision. For example, a court could not assert jurisdiction over a foreign defendant who lacks minimum contacts with the United States as a whole.⁹⁹

This description may seem to depict a very tightly circumscribed class of cases. On closer examination, however, the class proves to be of substantial size. This is true because the second exclusion, where nationwide service is independently authorized, and the fourth exclusion, where personal jurisdiction would be unconstitutional, are narrow categories. The former is narrow in that only a small proportion of all federal statutes contain nationwide service provisions.¹⁰⁰ The latter is narrow be-

⁹⁵ Cf. H.R. 3662, 100th Cong., 1st Sess. (1987) (bill proposing worldwide process for products liability actions against foreign defendants); 133 Cong. Rec. H10,785 (1987) (statement of Rep. Dan Glickman) (products liability jurisdiction bill was, in part, attempt to eliminate disadvantages to American businesses stemming from lack of domestic jurisdiction over foreign businesses).

⁹⁶ See Proposed Amendments, *supra* note 6, Rule 4(l)(2), at 15-16.

⁹⁷ See notes 29-34 and accompanying text *supra*.

⁹⁸ See text accompanying notes 21-28 *supra*.

⁹⁹ See notes 149-60, 218-21 and accompanying text *infra*.

¹⁰⁰ One commentator refers to "the glacial growth of specific statutes expressly providing for nationwide service." Sinclair, *supra* note 34, at 1241. But see Fullerton, *supra* note 71, at 4 ("While the first few nationwide personal jurisdiction statutes only applied in narrow circumstances, in recent years Congress has permitted nationwide jurisdiction in a much broader

cause the constitutional requirement of aggregate minimum contacts with the United States¹⁰¹ is an easy one to meet.¹⁰²

One example of a case in which the new rule would have affected the personal jurisdiction determination is *Omni*.¹⁰³ Had the proposed Rule 4 been in effect when the *Omni* case was brought, the district court could have obtained personal jurisdiction over the third party defendants. Their aggregate contacts through doing business in the United States probably would have sufficed to make the exercise of personal jurisdiction constitutional.¹⁰⁴ Since the case was brought under a federal statute, personal jurisdiction would have been obtained through the express authorization of nationwide service of process in the new Rule 4.

Another illustrative example is the district court case of *Martin v. Delaware Law School of Widener University*.¹⁰⁵ In that case, a former law student brought suit in federal district court in Delaware against, among others, the Pennsylvania Board of Law Examiners and two Pennsylvania judges.¹⁰⁶ The plaintiff alleged that these defendants violated his civil rights¹⁰⁷ by refusing to admit him to the bar and by "issu[ing] orders against him" when he tried to counter an alleged "disinformation scheme" his college had pursued against him.¹⁰⁸ The three Pennsylvania defendants moved to dismiss on the ground that the District Court of Delaware lacked personal jurisdiction over them.¹⁰⁹ The court looked to Rule 4 to determine whether service of process was authorized and thus whether the court could assert personal jurisdiction: "In order for this Court to exercise jurisdiction over these defendants, this service must be adequate under the provisions of F.R.C.P. Rule 4(e) or 4(f)."¹¹⁰ The defendants were not present within the state of Delaware, nor were they servable under any federal statute.¹¹¹ Also, because they had essentially no contacts with Delaware,¹¹² they did not fall within the reach of the

array of cases.").

¹⁰¹ See notes 149-60 and accompanying text *infra*.

¹⁰² See text accompanying note 221 *infra*.

¹⁰³ For a discussion of the *Omni* case, see text accompanying notes 35-60 *supra*.

¹⁰⁴ See *Point Landing, Inc. v. Omni Capital Int'l*, 795 F.2d 415, 428 (5th Cir. 1986) (Wisdom, J., concurring in part and dissenting in part), *aff'd sub nom. Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404 (1987). The Supreme Court declined to decide the question of aggregate contacts. *Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404, 408-09 n.5 (1987).

¹⁰⁵ 625 F. Supp. 1288 (D. Del. 1985).

¹⁰⁶ *Id.* at 1292.

¹⁰⁷ The plaintiff alleged that the defendants had violated 42 U.S.C. § 1983. *Martin*, 625 F. Supp. at 1292.

¹⁰⁸ *Id.* at 1293.

¹⁰⁹ *Id.* at 1294.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 1295.

Delaware long-arm statute.¹¹³ The court therefore dismissed the claims against these defendants for lack of personal jurisdiction.¹¹⁴

Had the proposed Rule 4 been in effect, the *Martin* court would have been able to obtain personal jurisdiction over the Pennsylvania defendants.¹¹⁵ Because the case arose under federal law,¹¹⁶ it would have fallen within the new rule's scope.¹¹⁷ Since the defendants resided in Pennsylvania,¹¹⁸ which is, of course, "in any judicial district of the United States,"¹¹⁹ service would have been proper under the new Rule 4.¹²⁰ Moreover, under the new Rule 4's nationwide service of process provision, the assertion of jurisdiction would have been constitutional. By virtue of their residence in Pennsylvania, the defendants would have had sufficient contacts with the United States to meet the aggregate contacts test of due process.¹²¹

The new rule would affect the cases discussed above in that personal jurisdiction could be asserted where it previously had been unavailable. But in assessing the rule's true impact, one must look not only to personal jurisdiction, but more broadly to where suits ultimately could be litigated. Venue, as a further practical limitation on forum selection, must therefore be considered.

The most important practical limitation on where suits ultimately can be litigated, other than personal jurisdiction, is venue. Under the federal venue statute,¹²² venue in federal question cases is limited and defendant-oriented. A federal question action can be brought only in the district where all defendants reside or where the claim arose.¹²³

¹¹³ Del. Code Ann. tit. 10, § 3104 (1975). See *Martin*, 625 F. Supp. at 1294-95.

¹¹⁴ *Martin*, 625 F. Supp. at 1294-95.

¹¹⁵ It should be noted that although the district court in Delaware would have obtained personal jurisdiction over these defendants, venue in the District of Delaware would nonetheless have been improper under 28 U.S.C. § 1391(b), because the defendants resided in Pennsylvania and the claims against them arose in Pennsylvania. See *id.* at 1294 (venue improper). Thus, while the new rule would expand the reach of federal courts' personal jurisdiction, its practical impact would be significantly limited by venue restrictions. See text accompanying notes 122-31 *infra*.

¹¹⁶ Subject matter jurisdiction was founded on 28 U.S.C. §§ 1331 (federal question) and 1343 (civil rights).

¹¹⁷ See Proposed Amendments, *supra* note 6, Rule 4(l)(2), at 15-16.

¹¹⁸ *Martin*, 625 F. Supp. at 1294.

¹¹⁹ Proposed Amendments, *supra* note 6, Rule 4(e), at 8, and 4(h), at 11.

¹²⁰ Indeed, in holding that the Pennsylvania defendants were not amenable to service of process, the court in *Martin* commented that no authorization for nationwide service of process was present. *Martin*, 625 F. Supp. at 1294.

¹²¹ See text accompanying notes 149-60 *infra*.

¹²² 28 U.S.C. § 1391 (1982).

¹²³ See *id.* § 1391(b). Venue in federal question cases is more restrictive than venue in diversity cases. Compare *id.* (venue in federal question cases based on residence of all defendants or where claim arose) with *id.* § 1391(a) (venue in diversity cases based on residence of all plaintiffs, all defendants, or where claim arose). This differential makes little sense under the

This statutory venue limitation severely restricts a plaintiff's ability to sue out-of-state defendants. A defendant's amenability to service of process makes possible the assertion of personal jurisdiction, but does not in itself guarantee the plaintiff's ability to bring suit in a particular forum. Venue requirements also must be met.¹²⁴ In a district where the venue requirements are not met, suit cannot be brought, even if personal jurisdiction has been properly asserted through nationwide service of process.¹²⁵

For corporate defendants, the venue limitation is of less consequence than for individual defendants. Until recently, the federal corporate venue statute defined a corporation's "residence" for venue purposes as "any judicial district in which it is incorporated or licensed to do business or is doing business."¹²⁶ Venue based on the defendant's "residence" was therefore comparatively easily met for corporate defendants.

A recent amendment to the venue statute makes corporate venue even less restrictive.¹²⁷ The new statute explicitly links venue to personal jurisdiction. "For purposes of venue under this chapter," it provides, "a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the ac-

present Rule 4, see C. Wright, *Law of Federal Courts* 240 (4th ed. 1983), but would become entirely rational (in its effect, if not its cause) were there to be nationwide service of process in all federal question cases in federal courts, since the venue limitations of § 1391(b) would protect defendants from having to litigate in inconvenient forums.

Completely defendant-oriented venue would not include venue where the claim arose, but rather would be limited to venue where defendant resides or is found. Thus § 1391(b), while relatively restrictive and defendant-oriented, is not as restrictive as it could be.

¹²⁴ Cf. Amendments to Rules of Civil Procedure for the United States District Courts, Statement of Mr. Justice Black and Mr. Justice Douglas, 374 U.S. 865, 869 (1963) ("Those changes [to Rule 4, allowing use of state long-arm statutes,] will apparently have little effect insofar as 'federal question' litigation is concerned, since 28 U.S.C. § 1391(b) requires such suits to be brought 'only in the judicial district where all defendants reside'").

The venue restriction may explain why there have been few constitutional challenges to statutory nationwide service of process provisions.

¹²⁵ Specialized venue provisions attached to federal statutes can function similarly as limits on the assertion of judicial authority. See, e.g., *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 672 (7th Cir. 1987) (RICO venue provision probably did not authorize venue in Illinois, although personal jurisdiction was properly asserted through nationwide service of process), cert. denied, 108 S. Ct. 1472 (1988). Cf. *FTC v. Jim Walter Corp.*, 651 F.2d 251, 254 (5th Cir. Unit A July 1981) (finding that Federal Trade Commission Act implicitly authorizes nationwide service of process, because "Congress would not have limited the permissible venues for F.T.C. enforcement actions unless it contemplated extra-territorial service of process"). Indeed, such venue provisions can be used precisely to provide wider or narrower forum options, depending on the policies underlying the particular federal statute. See notes 240-45 and accompanying text *infra*.

¹²⁶ 28 U.S.C. § 1391(c) (1982) (amended 1988). On the definition of "doing business" for venue purposes, see note 235 *infra*.

¹²⁷ Compare *id.* (previous version) with 28 U.S.C.A. § 1391(c) (Supp. 1989) (amended version).

tion is commenced.”¹²⁸ In other words, once personal jurisdiction has been established, venue imposes no additional limitation on where suits against only corporate defendants may be brought.¹²⁹

Because the new corporate venue statute links venue to personal jurisdiction, a nationwide personal jurisdiction provision would expand venue dramatically for corporate defendants. Under the proposed Rule 4, if the new corporate venue statute remains in effect, venue in federal question actions against corporate defendants would be proper in any United States judicial district.¹³⁰

Venue, in sum, would sharply restrict the practical effect of the proposed nationwide personal jurisdiction rule on individual defendants. The rule's impact would therefore be smaller than one might imagine. Nationwide personal jurisdiction in all federal question cases does not mean that all federal question suits may be brought in any judicial district. But because the newly amended corporate venue statute links venue to personal jurisdiction, under the proposed rule, venue restrictions would provide no such protection to corporate defendants. Those defendants, unlike individual defendants, would indeed be subject to suit nationwide. Unless the new corporate venue statute is amended¹³¹ the most significant limitation on nationwide personal jurisdiction—that of venue—will be meaningless to corporate defendants.

The expansion of the personal jurisdictional reach of the federal courts in federal question cases through the new Rule 4 would bring practical benefits. Nevertheless, the proposed rule is vulnerable to a number of criticisms. These criticisms, based on constitutionality, procedure, and policy, must now be examined in order to gain a complete

¹²⁸ 28 U.S.C. § 1391(c) (1982) (amended 1988).

¹²⁹ If, however, a plaintiff sues joint defendants, corporate and individual—rather than a sole corporate defendant or multiple corporate defendants—venue does limit forum options. Because § 1391(b) allows venue only where the claim arose or where *all* defendants reside, suit could be brought only where the claim arose or where the individual defendant resides, despite the broad new corporate venue statute.

¹³⁰ This combination of nationwide service and jurisdiction-linked venue would give a wind-fall tactical advantage to plaintiffs. An Alaskan plaintiff, for example, might sue a New York corporate defendant on a federal question claim in federal court in Alaska. The proposed Rule 4 would authorize the assertion of jurisdiction over the defendant in the Alaska federal court. Venue would fail to protect the defendant from the inconvenience of Alaskan litigation, since under the new corporate venue statute, venue is proper wherever personal jurisdiction is proper. The defendant, of course, could request venue transfer under 28 U.S.C. § 1404 or dismissal on forum non conveniens grounds. But these doctrines are discretionary. The plaintiff will have gained a substantial bargaining edge in settlement negotiations, since the defendant may well prefer plaintiff's demands to the prospect of litigating in Alaska. For further discussion of the use of inconvenient litigation for harassment, see text accompanying notes 207-11 *infra*.

¹³¹ This Note proposes that the corporate venue statute be amended if the new Rule 4 is adopted. See notes 234-35 and accompanying text *infra*.

understanding of the new rule.

II

AN UNCONVINCING RESPONSE: ATTACKING THE RULE'S VALIDITY

A. *Constitutional Attack*

Critics of the proposed rule¹³² would argue that nationwide personal jurisdiction is unconstitutional. More precisely, they would argue that jurisdiction under the rule would be unconstitutional if the defendant lacked minimum contacts with the forum state. The constitutional attack on the proposed rule's validity begins with an examination of state court personal jurisdiction doctrine.¹³³

Traditional personal jurisdiction dogma focused on the themes of power and territoriality.¹³⁴ In the landmark case of *Pennoyer v. Neff*,¹³⁵ the Supreme Court established the notion that the defendant's physical presence within the state—and thus the state's physical power over the defendant—was a prerequisite to the court's assertion of personal jurisdiction over the defendant.¹³⁶ "The authority of every tribunal," the Court declared, "is necessarily restricted by the territorial limits of the State in which it is established."¹³⁷

Over the next seven decades, courts extended personal jurisdiction beyond mere in-state physical presence to such limited situations as "implied consent"¹³⁸ and in-state domicile.¹³⁹ The basic power theory of personal jurisdiction,¹⁴⁰ however, remained intact until the Supreme

¹³² The proposal for amending Rule 4 is too new to have given rise to published criticisms. The "critics" of the proposed rule discussed in this Note are, for that reason, largely hypothetical. Their arguments, however, are derived by extrapolation from closely analogous articles and opinions. The attacks discussed anticipate the criticisms most likely to be leveled against the new rule.

¹³³ For general discussions of the history of personal jurisdiction in the state courts, see 4 C. Wright & A. Miller, *supra* note 5, §§ 1064-1067; Silberman, Shaffer v. Heitner: The End of an Era, 53 N.Y.U. L. Rev. 33, 39-62 (1978); Stein, Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction, 65 Tex. L. Rev. 689, 689-733 (1987).

¹³⁴ See R. Casad, *supra* note 5, § 4:02; 4 C. Wright & A. Miller, *supra* note 5, § 1064.

¹³⁵ 95 U.S. 714 (1877).

¹³⁶ See *id.* at 720.

¹³⁷ *Id.*

¹³⁸ See, e.g., *Hess v. Pawloski*, 274 U.S. 352, 356 (1927) (non-resident defendant's operation of motor vehicle within state constituted implied consent to jurisdiction).

¹³⁹ See, e.g., *Milliken v. Meyer*, 311 U.S. 457, 462 (1940) (domicile in state held sufficient to bring absent defendant within reach of state's jurisdiction for purposes of personal judgment by means of appropriate substituted service).

¹⁴⁰ The power theory premises personal jurisdiction on a sovereign's authority to adjudicate the rights and responsibilities of those within that sovereign's power. See von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. Rev. 279, 285 (1983).

Court decided *International Shoe Co. v. Washington*¹⁴¹ in 1945.

The *International Shoe* Court rejected the *Pennoyer* obsession with power. The Court held that personal jurisdiction was not premised exclusively on notions of sovereignty; rather, personal jurisdiction depended upon "traditional notions of fair play and substantial justice,"¹⁴² including "an estimate of the inconveniences" to the defendant.¹⁴³ The "minimum contacts"¹⁴⁴ approach to personal jurisdiction derived from this analysis,¹⁴⁵ and the progeny of *International Shoe* firmly established minimum contacts as the guiding principle of personal jurisdiction.¹⁴⁶

Some commentators and judges, looking at this historical evolution of state court personal jurisdiction doctrine, argue that federal court personal jurisdiction based upon nationwide service of process is constitutional only if that assertion of jurisdiction is "fair" as the term is used in *International Shoe*.¹⁴⁷ According to this view, personal jurisdiction is based on fairness rather than sovereignty. If it is unfair to require a defendant to appear in a given state court, surely it is equally unfair to require her to appear in the federal court across the street.¹⁴⁸ Therefore, personal jurisdiction in federal court is unconstitutional wherever it would be unconstitutional in the corresponding state court—that is,

¹⁴¹ 326 U.S. 310 (1945).

¹⁴² *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Chief Justice Stone's much cited passage bears repeating:

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id.

¹⁴³ *Id.* at 317 (quoting *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930) (L. Hand, J.)).

¹⁴⁴ *Id.* at 316.

¹⁴⁵ See Friedenthal, *supra* note 3, § 3.10.

¹⁴⁶ See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 105 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).

¹⁴⁷ See, e.g., *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 198 (E.D. Pa. 1974); Fullerton, *supra* note 71, at 62; Lusardi, *supra* note 30, at 32; Note, *Pendent Personal Jurisdiction and Nationwide Service of Process*, 64 N.Y.U. L. Rev. 113, 125 (1989).

¹⁴⁸ See Abraham, *Constitutional Limitations Upon the Territorial Reach of Federal Process*, 8 Vill. L. Rev. 520, 533-34 (1963). Professor Abraham states the argument as follows:

If a defendant is forced to litigate in the courts of a distant state with which he has had no contact, it is considered so unfair to him as to offend the "traditional notions of fair play and substantial justice" embodied in the due process clause of the fourteenth amendment. Might it not also be unfair to force him to litigate in the federal court across the street? Might this unfairness not offend the "traditional notions of fair play and substantial justice" embodied in the due process clause of the fifth amendment?

Id. See also Stephens, *The Federal Court Across the Street: Constitutional Limits on Federal Court Assertions of Personal Jurisdiction*, 18 U. Rich. L. Rev. 697, 697 (1984) (discussing Abraham's argument).

wherever the defendant lacks minimum contacts with the state in which the federal district court sits.

This constitutional attack on the nationwide personal jurisdiction provision is misplaced because it depends on a faulty analogy of state court jurisdiction to federal court jurisdiction. Personal jurisdiction in the federal courts differs fundamentally from personal jurisdiction in the state courts.¹⁴⁹ The federal courts exercise the "judicial Power of the United States,"¹⁵⁰ not the judicial power of the state in which the court sits. "Because the district court's jurisdiction is always potentially . . . co-extensive with the boundaries of the United States," the Fifth Circuit has explained, "due process requires only that a defendant in a federal suit have minimum contacts with the United States, 'the sovereign that has created the court.'"¹⁵¹ A majority of the circuit courts that have considered the issue have held that the defendant's aggregate contacts with the entire United States provide the measure of minimum contacts necessary for personal jurisdiction in the federal courts in those cases where nationwide service of process is provided.¹⁵²

¹⁴⁹ In the federal courts, it is the fifth amendment's due process clause at issue, rather than that of the fourteenth amendment. See *In re Chase & Sanborn Corp.*, 835 F.2d 1341, 1344 (11th Cir.), rev'd on other grounds sub nom. *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782 (1989); *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 972 n.9 (5th Cir. 1984), cert. denied sub nom. *Grim Hotel v. Brock*, 471 U.S. 1124 (1985). The distinction between the two amendments is of little consequence in itself, however. Their divergent applications in the context of personal jurisdiction results not from their distinct locations in the Constitution, but rather from the distinction between federal and state courts.

¹⁵⁰ U.S. Const. art. III, § 1.

¹⁵¹ *FTC v. Jim Walter Corp.*, 651 F.2d 251, 256 (5th Cir. Unit A July 1981) (quoting *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting on other grounds)). But see *Burstein v. State Bar of Calif.*, 693 F.2d 511, 515-16 n.8 (5th Cir. 1982) (questioning vitality of *Jim Walter* sovereignty analysis).

¹⁵² See *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1315-16 (9th Cir. 1985); *Jim Walter*, 651 F.2d at 256; *Fitzsimmons v. Barton*, 589 F.2d 330, 333 (7th Cir. 1979); *Driver v. Helms*, 577 F.2d 147, 156 n.25 (1st Cir. 1978), rev'd on other grounds sub nom. *Stafford v. Briggs*, 444 U.S. 527 (1980); *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974). See also *Haile v. Henderson Nat'l Bank*, 657 F.2d 816, 825 (6th Cir. 1981) (where nationwide service provided, due process requires only reasonable notice), cert. denied, 455 U.S. 949 (1982). This view has been expressed in numerous other opinions as well. See, e.g., *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting on other grounds); *Steinberg & Lyman v. Takacs*, 690 F. Supp. 263, 265-66 (S.D.N.Y. 1988); *Sparkowich v. American S.S. Owner's Mut. Protection and Indemnity Ass'n*, 687 F. Supp. 695, 698 n.6 (D. Me. 1988); *Whistler Corp. v. Solar Elects., Inc.*, 684 F. Supp. 1126, 1128 (D. Mass. 1988); *Entek Corp. v. Southwest Pipe & Supply Co.*, 683 F. Supp. 1092, 1099-1101 (N.D. Tex. 1988); *Prospect Hill Resources, Inc. v. Chenoweth*, 69 B.R. 79 (Bankr. N.D. Ga. 1986); *Clement v. Pehar*, 575 F. Supp. 436, 438-39 (N.D. Ga. 1983); *Pioneer Properties, Inc. v. Martin*, 557 F. Supp. 1354, 1358 n.6 (D. Kan. 1983), appeal dismissed, 776 F.2d 888 (10th Cir. 1985). See also *Point Landing, Inc. v. Omni Capital Int'l*, 795 F.2d 415, 428 (5th Cir. 1986) (Wisdom, J., concurring in part and dissenting in part) ("In a federal question action, aggregating a defendant's national contacts is analogous to aggregating state contacts in a diversity case."), aff'd sub nom. *Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404 (1987); *Max Daetwyler Corp. v.*

This aggregate contacts approach follows naturally from the minimum contacts approach used in state court personal jurisdiction. The minimum contacts doctrine requires that, in order for an assertion of jurisdiction to be constitutionally permissible, there be sufficient contacts between the defendant and the forum.¹⁵³ In a state court case, the forum is the state. In a federal question case in federal court, however, the forum is properly understood to be the United States.¹⁵⁴ In Judge Easterbrook's words, "The question is whether the polity, whose power the court wields, possesses a legitimate claim to exercise force over the defendant."¹⁵⁵ Because a federal court in a federal question case is not implementing any state's policy, but is rather exercising the power of the country as a whole, its jurisdictional reach should be conceived in national terms.¹⁵⁶

Article III of the Constitution empowers Congress to establish federal courts below the Supreme Court as it deems appropriate.¹⁵⁷ Congress could have established only one federal district—a nationwide one—with jurisdiction running throughout that district.¹⁵⁸ In other words, federal districts need not have been defined in terms of state boundaries.¹⁵⁹ As far as exercise of the federal judicial power is con-

Meyer, 762 F.2d 290, 293-94 (3d Cir.) (dictum), cert. denied, 474 U.S. 980 (1985).

One circuit has indicated in general terms a reluctance to adopt the aggregate contacts approach. See *Fraleigh v. Chesapeake & O. Ry.*, 397 F.2d 1, 3 (3d Cir. 1968). See also *Chase & Sanborn*, 835 F.2d at 1344 n.8 (noting lack of consensus). See generally Fullerton, *supra* note 71, at 5, 14-22 (discussing with disapproval development of aggregate contacts approach).

According to Wright and Miller, the aggregate contacts approach was first suggested in Green, *Federal Jurisdiction In Personam of Corporations and Due Process*, 14 Vand. L. Rev. 967, 981 (1961). 4 C. Wright & A. Miller, *supra* note 5, at § 1067.1.

The Supreme Court has declined to address explicitly the constitutionality of personal jurisdiction based on aggregate contacts with the United States. See *Omni*, 108 S. Ct. at 408-09 n.5; *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 n.* (1987).

¹⁵³ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

¹⁵⁴ See *Haile*, 657 F.2d at 825; *Jim Walter*, 651 F.2d at 256; *Fitzsimmons*, 589 F.2d at 333; *Driver*, 577 F.2d at 156 n.25; *Mariash*, 496 F.2d at 1143.

¹⁵⁵ *Lisak v. Mercantile Bancorp. Inc.*, 834 F.2d 668, 671 (7th Cir. 1987), cert. denied, 108 S. Ct. 1472 (1988).

¹⁵⁶ *Id.* Conceiving federal court personal jurisdiction in national terms may be problematic where a pendent state claim is joined with the federal question claim. In particular, a plaintiff may attach a state claim to a bogus federal claim, and thus use a nationwide service provision to obtain personal jurisdiction on the state claim in a forum where it would otherwise have been impermissible. One possible solution to this problem would be severance of the state and federal claims in such situations. For a discussion of exactly this problem and potential solutions, see Note, *supra* note 147.

¹⁵⁷ U.S. Const. art. III, § 1.

¹⁵⁸ See *United States v. Union Pac. R.R.*, 98 U.S. (8 Otto) 569, 603-04 (1878) (Congress may make court in District of Columbia exclusive forum for certain claims arising under federal law).

¹⁵⁹ *Id.* But see *Sinclair*, *supra* note 34, at 1241-42 (emphasizing significance of actual—rather than potential—federal district prescriptions, which have been based on state territorial

cerned, state boundaries are given no significance by the Constitution.¹⁶⁰

The discussion in recent personal jurisdiction cases about fairness¹⁶¹ should not be taken to establish that personal jurisdiction is no longer concerned with sovereignty.¹⁶² "Fairness" has become almost a required incantation in every jurisdictional analysis.¹⁶³ But that incantation can refer either to convenience or to sovereignty; it is meaningless without further inquiry. While some have treated the references to "fairness" as evidence of a judicial focus on convenience,¹⁶⁴ "fairness" in the jurisdictional sense can also address how much power the sovereign is to be accorded.¹⁶⁵ A state court can constitutionally take personal jurisdiction, according to this conception, where it is "fair" to consider the defendant to have submitted herself to that state's limited sovereignty. Similarly, a federal court constitutionally may assert personal jurisdiction where it is fair to consider the defendant to have submitted herself to

boundaries).

¹⁶⁰ See *Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947, 950 (1st Cir. 1984) ("[M]inimum contacts' with a particular district or state for purposes of personal jurisdiction is not a limitation imposed on the federal courts in a federal question case by due process concerns. The Constitution does not require the federal districts to follow state boundaries."). Cf. *Lisak*, 834 F.2d at 671 ("[T]here is no constitutional obstacle to nationwide service of process in the federal courts in federal-question cases.").

¹⁶¹ See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-74, 477-78 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 424-25, 428 (1984) (Brennan, J., dissenting).

¹⁶² See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-94 (1980) (stressing personal jurisdiction's concern with "interstate federalism" and with states' "status as coequal sovereigns"); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (restrictions on personal jurisdiction are "a consequence of territorial limitations on the power of the respective States"). But see *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 702-04 (1982) (focusing on individual liberty interest, rather than sovereignty, as heart of fourteenth amendment personal jurisdiction doctrine).

¹⁶³ See, e.g., *Asahi*, 480 U.S. at 116; *Burger King*, 471 U.S. at 473-74, 477-78; *Helicopteros*, 466 U.S. at 424-25, 428 (Brennan, J., dissenting); *Irving v. Owens-Corning Fiberglass Corp.*, 864 F.2d 383, 385 (5th Cir.), reh'g denied, 872 F.2d 423 (1989), petition for cert. filed (June 26, 1989); *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1167 (6th Cir. 1988); *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 428 (2d Cir. 1987), rev'd, 109 S. Ct. 683 (1989).

¹⁶⁴ See *Douglas Battery Mfg. Co. v. Taylor Auto Supply, Inc.*, 537 F. Supp. 1072, 1074 (M.D.N.C. 1982); *Dexter Shoe Co. v. Chippewa Shoe Co.*, 209 U.S.P.Q. 719, 720-24 (D. Me. 1980); *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 191 (E.D. Pa. 1974).

¹⁶⁵ The Seventh Circuit analyzed the fairness question as follows:

[T]he "fairness" standard imposed by *Shaffer* relates to the fairness of the exercise of power by a particular sovereign, not the fairness of imposing the burdens of litigating in a distant forum. Applying this standard of fairness, it is clear that this instance of personal service [under the nationwide service provision of the Securities Exchange Act of 1934] satisfies Due Process. Here the sovereign is the United States, and there can be no question but that the defendant, a resident citizen of the United States, has sufficient contacts with the United States to support the fairness of the exercise of jurisdiction over him by a United States court.

Fitzsimmons v. Barton, 589 F.2d 330, 333 (7th Cir. 1979).

the United States's sovereignty.¹⁶⁶ Because the sovereign power of the United States extends over a far wider territory than the sovereign power of any given state, it is fair to consider the jurisdictional reach of the federal courts to be broader than that of any state court.

Admittedly, merely redefining "fairness" does nothing to avoid the confusion inherent in the word.¹⁶⁷ The essence of personal jurisdiction cannot be found in facile incantations. But neither does the talismanic use of "fairness" prove that convenience is at the heart of jurisdictional due process.

Cases involving the one hundred mile bulge provision of Rule 4(f) provide an obstacle to those who argue that state boundaries provide bright lines of demarcation and thus that nationwide service would violate constitutional norms by ignoring those boundaries. Such cases demonstrate that a federal court constitutionally may exercise personal jurisdiction over an out-of-state defendant, even if that defendant has no contacts with the state in which the district court sits.¹⁶⁸ As long as the defendant has sufficient contacts with the bulge area, personal jurisdiction exercised pursuant to service under the bulge provision meets due process standards.¹⁶⁹

Additionally, the argument for due process limitations on nationwide personal jurisdiction fails to recognize the distinction between sovereignty as a *limit on* personal jurisdiction and sovereignty as the *engine of* personal jurisdiction. The *International Shoe* line of cases established that territorial sovereignty was not an absolute limitation on a court's jurisdictional reach.¹⁷⁰ A court could reach beyond the territorial boundaries of the sovereign that created the court, as long as that reach comported with due process notions of fairness. But those cases did not reject the idea that, at least where the power of the sovereign is clear, such sovereignty suffices to grant jurisdiction.¹⁷¹ In other words, sover-

¹⁶⁶ See *FTC v. Jim Walter Corp.*, 651 F.2d 251, 255-56 (5th Cir. Unit A July 1981).

¹⁶⁷ See R. Dworkin, *Law's Empire* 164 (1986) (term "fairness" is "somewhat arbitrary" and its use varies with user); cf. J. Bentham, *A Fragment on Government*, ch. V, sec. 6, n.b, in *A Comment on the Commentaries and A Fragment on Government* 392, 494-96 (J. Burns & H.L.A. Hart eds. 1977) (discussing difficulties inherent in defining abstract terms).

¹⁶⁸ See *Quinones v. Pennsylvania Gen. Ins. Co.*, 804 F.2d 1167, 1172-78 (10th Cir. 1986); *Sprow v. Hartford Ins. Co.*, 594 F.2d 412, 417 (5th Cir. 1979); *Coleman v. American Export Isbrandtsen Lines*, 405 F.2d 250, 252 (2d Cir. 1968).

¹⁶⁹ See *Quinones*, 804 F.2d at 1172-78; *Sprow*, 594 F.2d at 417. See also *Coleman*, 405 F.2d at 252 (minimum contacts with entire state in which bulge service occurred are sufficient).

¹⁷⁰ See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-74 (1985); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-23 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

¹⁷¹ It might be argued that, while the in personam cases discussed above did not reject sovereignty as a sufficient basis for personal jurisdiction, *Shaffer v. Heitner*, 433 U.S. 186 (1977), did. In *Shaffer*, the Supreme Court held that the mere presence of property in a state does not suffice to make the exercise of quasi-in-rem jurisdiction constitutional; a plaintiff must

eignty is not necessary for personal jurisdiction, but it is sufficient.¹⁷²

In sum, while constitutional concerns may limit slightly the application of the proposed rule to prevent egregious inconvenience, the more general constitutional attack on the validity of the proposed rule does not withstand scrutiny. Even if they were to grant the constitutionality of a provision authorizing nationwide service of process in federal question cases, opponents of the proposed Rule 4 might nevertheless argue, on procedural grounds, that the rule is not a legitimate means of achieving such a goal.

B. Procedural Attack

Procedural attacks upon the adoption of the proposed rule might be premised on Rule 82¹⁷³ or on the Rules Enabling Act.¹⁷⁴ These attacks would posit that the federal rulemakers may legitimately use Rule 4 to regulate service of process, but not to revamp personal jurisdiction.¹⁷⁵

establish that the defendant has minimum contacts with the forum state. *Id.* at 212. The minimum contacts doctrine was thus, for the first time, used to restrict jurisdiction, whereas previously it had been used only to expand it. This view of *Shaffer* suggests that personal jurisdiction based solely on defendant's transient presence in state ("tag" jurisdiction), see, e.g., *Darrah v. Watson*, 36 Iowa 116, 119 (1873), may no longer be constitutionally viable. See *Harold M. Pitman Co. v. Typecraft Software Ltd.*, 626 F. Supp. 305 (N.D. Ill. 1986); *Duehring v. Vasquez*, 490 So. 2d 667 (La. App. 1986); *Bernstine, Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 Vill. L. Rev. 38, 60-68 (1979); *Silberman*, *supra* note 133, at 75-76 n.236.

Central to *Shaffer*, though, was the issue of jurisdictional attachment. The Court recognized that quasi-in-rem jurisdiction really concerns the rights and duties of people, not property. For that reason, it held that attachment jurisdiction must be subjected to a minimum contacts analysis. See *Shaffer*, 433 U.S. at 212. Viewed in this light, *Shaffer* did not reject sovereignty over the individual as a sufficient basis for personal jurisdiction. Physical presence in a state probably remains a sound basis for personal jurisdiction. See, e.g., *Amusement Equip., Inc. v. Mordelt*, 779 F.2d 264, 270 (5th Cir. 1985); *Leab v. Streit*, 584 F. Supp. 748, 755-56 (S.D.N.Y. 1984); *Hutto v. Plagens*, 254 Ga. 512, 513, 330 S.E.2d 341, 343 (1985). See also *R. Casad*, *supra* note 5, § 4:11 (listing cases upholding physical presence as valid basis for asserting jurisdiction). Instead, *Shaffer* simply recognized that power over property does not necessarily imply power over the owner. See *Humphrey v. Langford*, 246 Ga. 732, 734, 273 S.E.2d 22, 23 (1980).

Even if it were true that *Shaffer* eliminated "tag" jurisdiction by requiring minimum contacts in every case, that would not imply that jurisdiction based on nationwide service of process would, in order to be constitutional, also require minimum contacts with the forum state. The relevant boundaries are those of "the sovereign that has created the court." *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting). Thus, nationwide personal jurisdiction in federal court is constitutional if the defendant has minimum contacts with the United States, see text accompanying notes 149-60 *supra*, despite the possible invalidity of "tag" jurisdiction after *Shaffer*.

¹⁷² See *R. Casad*, *supra* note 5, § 4:04.

¹⁷³ Fed. R. Civ. P. 82.

¹⁷⁴ 28 U.S.C. § 2072 (1982).

¹⁷⁵ See *Point Landing, Inc. v. Omni Capital Int'l*, 795 F.2d 415, 429 (5th Cir. 1986) (Wisdom, J., concurring in part and dissenting in part) ("Rule 4 provides the mechanics for service of process. It has no necessary relation with a court's acquiring personal jurisdiction."), *aff'd*

Responding to these arguments requires an understanding of the interrelationship between service of process and personal jurisdiction. Service of process is the ritual by which a court asserts personal jurisdiction over a party.¹⁷⁶ Without valid service, there is no personal jurisdiction.¹⁷⁷ Therefore, while service of a summons is not equivalent to jurisdiction, the two are inextricably linked.

Rule 4 contains two types of provisions: mechanical and jurisdictional. The mechanical provisions delineate how process can be served.¹⁷⁸ The jurisdictional provisions delineate where or on whom process can be served.¹⁷⁹ It is possible to imagine a service rule that contains only mechanical provisions. Such a rule would only govern when service may be made,¹⁸⁰ who may deliver the summons,¹⁸¹ how the mail may be used,¹⁸² and other such requirements regarding how process is to be served. The rule would not address where or on whom process may be served, but would leave these jurisdictional matters for some other rule or statute.

Rule 4, however, is not such a purely mechanical rule, nor has it ever been. The rule included jurisdictional provisions at its first appearance in 1938.¹⁸³ Section 4(f) of the original rule authorized service of process "anywhere within the territorial limits of the state in which the district court is held"¹⁸⁴ or pursuant to a federal long-arm statute.¹⁸⁵

sub nom. *Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404 (1987).

¹⁷⁶ See 4 C. Wright & A. Miller, *supra* note 5, § 1063 ("The primary function of Rule 4 is to provide the mechanism for bringing notice of the commencement of an action to defendant's attention and to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit.").

¹⁷⁷ See *Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404, 409 (1987) ("[B]efore a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant's amenability to service of summons."); *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 847 (11th Cir. 1988) (citing *Omni*); *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671 (7th Cir. 1987) ("Service of process is how a court gets jurisdiction over the person."), cert. denied, 108 S. Ct. 1472 (1988).

¹⁷⁸ E.g., Fed. R. Civ. P. 4(a) (issuance of summons by clerk); *id.* Rule 4(c)(2)(A) (service by any nonparty over 18 years of age); *id.* Rule 4(d)(1) (delivery to "dwelling house or usual place of abode").

¹⁷⁹ E.g., *id.* Rule 4(e)(1) (service pursuant to state long-arm provision); *id.* Rule 4(f) (service within state's territorial limits; one-hundred mile bulge provision).

¹⁸⁰ See *id.* Rule 4(j).

¹⁸¹ See *id.* Rule 4(c)(1)-(2)(B).

¹⁸² See *id.* Rule 4(c)(2)(C)(ii).

¹⁸³ See *Rules of Civil Procedure for the District Courts of the United States*, 308 U.S. 645, 667 (1937) [hereinafter 1938 Rules]; Whitten, *supra* note 14, at 72-73.

¹⁸⁴ 1938 Rules, *supra* note 183, at 667. Previously, a federal court could serve process only within its own district, absent an applicable federal long-arm statute. See Whitten, *supra* note 14, at 70-72.

¹⁸⁵ 1938 Rules, *supra* note 183, at 667.

1. Rule 82

One possible procedural argument against the adoption of the proposed Rule 4 is that Rule 82 prohibits the federal rules of civil procedure from expanding or restricting jurisdiction.¹⁸⁶ Rule 82 provides, "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."¹⁸⁷ That provision, opponents of the new Rule 4 might argue, makes it inappropriate for any federal rule of civil procedure to grant nationwide personal jurisdiction to the federal district courts.

Although Rule 82 has provoked some confusion in the federal courts,¹⁸⁸ the fallacy of erecting it as a barrier to a nationwide service rule becomes clear upon analysis. A proper understanding of Rule 82 requires an appreciation of the distinction between subject matter jurisdiction and personal jurisdiction.¹⁸⁹ Rule 82 applies only to the former.¹⁹⁰ Therefore, while it is true that the federal rules of civil procedure may not determine issues of federal subject matter jurisdiction, it does not follow that they may not extend or limit federal personal jurisdiction. Indeed, Rule 4's effects on the limits of personal jurisdiction—quite aside from the nationwide service proposal—are manifest.¹⁹¹

2. The Rules Enabling Act

A second and more potent procedural attack upon the new Rule 4 is that the Rules Enabling Act¹⁹² forbids the federal rulemakers to expand

¹⁸⁶ See *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 715 (1982) (Powell, J., concurring) (because of Rule 82, Rule 37 should not be considered grant of personal jurisdiction); *Point Landing, Inc. v. Omni Capital Int'l*, 795 F.2d 415, 429 (5th Cir. 1986) (Wisdom, J., concurring in part and dissenting in part) (because of Rule 82, Rule 4 should not be construed to limit personal jurisdiction of federal courts), *aff'd sub nom. Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404 (1987); *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 189 (8th Cir. 1948) (Johnsen, J., concurring) (because of Rule 82, Rule 23(a) may not affect personal jurisdiction).

¹⁸⁷ Fed. R. Civ. P. 82.

¹⁸⁸ See note 186 *supra*.

¹⁸⁹ See note 1 *supra* (defining subject matter jurisdiction and personal jurisdiction).

¹⁹⁰ See *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 445 (1946); *Quinones v. Pennsylvania Gen. Ins. Co.*, 804 F.2d 1167, 1175 n.6 (10th Cir. 1986); *Ransom v. Brennan*, 437 F.2d 513, 517 n.6 (5th Cir. 1971); *Paxton v. Southern Pa. Bank*, 93 F.R.D. 503, 505 (D. Md. 1982). In the words of the Supreme Court,

it is evident that Rule 4(f) and Rule 82 must be construed together, and that the Advisory Committee, in doing so, has treated Rule 82 as referring to venue and jurisdiction of the subject matter of the district courts . . . , rather than the means of bringing the defendant before the court already having venue and jurisdiction of the subject matter.

Mississippi Publishing Corp., 326 U.S. at 445.

¹⁹¹ Consider, for example, the bulge provision of Rule 4(f), which extends the personal jurisdiction of the federal courts beyond state lines in actions pursuant to Rule 14 and Rule 19. See text accompanying notes 26-28 *supra*.

¹⁹² Rules Enabling Act of 1934, 28 U.S.C. § 2072 (1982).

or restrict substantive rights.¹⁹³ The Rules Enabling Act empowers the Supreme Court to prescribe rules of civil procedure,¹⁹⁴ but includes a much discussed caveat:¹⁹⁵ "Such rules shall not abridge, enlarge or modify any substantive right."¹⁹⁶ A nationwide personal jurisdiction provision, critics might argue, would enlarge the right of plaintiffs to sue in federal court and simultaneously abridge the right of defendants to avoid inconvenient litigation. Such a rule would exceed the authority of the Supreme Court and the federal rulemakers, and would therefore be invalid.

To argue that personal jurisdiction or freedom therefrom constitutes a "substantive right" within the meaning of the Act is to disregard the history of the federal rules.¹⁹⁷ Such a position ignores Rule 4's traditional extensions of personal jurisdiction, such as Rule 4(e)'s authorization of the use of state long-arm statutes¹⁹⁸ and Rule 4(f)'s bulge provision.¹⁹⁹ This history of analogous jurisdictional manipulation through the federal rules indicates that the Rules Enabling Act probably does not prevent the rulemakers from providing nationwide personal jurisdiction through Rule 4.

Moreover, the Advisory Committee on the Federal Rules of Civil Procedure has recommended that approval of the new rule's nationwide personal jurisdiction provision be accompanied by express congressional approval in the form of a statutory amendment.²⁰⁰ The tacit congress-

¹⁹³ See Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 718 (1974).

¹⁹⁴ 28 U.S.C. § 2072 (1982).

¹⁹⁵ Though the caveat—the Rules Enabling Act's second sentence—is much discussed, it was considered surplusage by its makers. See Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1107-08 (1982). Congress intended simply to reinforce the limitation inherent in the first sentence, that the Court's power is to prescribe rules of "practice and procedure." *Id.* at 1107-08. But see Ely, *supra* note 193, at 723 (suggesting second sentence be given independent significance in evaluating validity of federal rule).

¹⁹⁶ 28 U.S.C. § 2072 (1982).

¹⁹⁷ See *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 445-46 (1946) (Rule 4(f), which governs where process may be served, is merely a procedural tool for effecting enforcement of substantive rights, which in no way violates the Act's proscription against abridging, modifying, or altering those rights.); *Hanna v. Plumer*, 380 U.S. 460, 464-65 (1965) (quoting *Murphree*); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). The *Sibbach* Court stated the test as follows: "The [Rules Enabling Act] test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach*, 312 U.S. at 14. See Burbank, *supra* note 195, at 1028-32. Personal jurisdiction, as a necessary part of the judicial process for enforcing rights, would likely be deemed "procedural" under the *Sibbach* definition.

¹⁹⁸ See text accompanying notes 23-25 *supra*.

¹⁹⁹ See text accompanying notes 26-28 *supra*.

²⁰⁰ See Proposed Amendments, *supra* note 6, Note at 1; notes 78-83 and accompanying text *supra*.

sional assent that accompanies the promulgation of every federal rule²⁰¹ apparently did not satisfy the rulemakers.²⁰² Whether the Advisory Committee worried that the rulemakers lacked authority under the Rules Enabling Act to provide nationwide jurisdiction solely by enacting a federal rule²⁰³ or simply that, as a discretionary matter, it would be wiser for Congress to enact so fundamental a rule, is not clear.²⁰⁴ Whatever the reason for the rulemakers' deference, it is clear that congressional enactment of the provision would circumvent whatever Rules Enabling Act problems there might otherwise be. This is because the "substantive right" limitation on the rulemaking power exists primarily to demarcate the proper spheres of the legislative and judicial branches.²⁰⁵ By recommending that the enactment of the nationwide jurisdiction provision be achieved by the affirmative will of Congress, the rulemakers gracefully sidestep any potential problems raised by the Rules Enabling Act.²⁰⁶

C. Policy Attack

Some opponents of the new Rule 4 may attack the proposal on policy grounds, arguing that nationwide service of process in all federal question cases will encourage harassment-motivated forum selection. Expanding the range of available forums could allow plaintiffs to enjoy an unfair tactical advantage.²⁰⁷ An Alaskan plaintiff, for instance, might sue a Floridian defendant on a federal question claim in federal court in Alaska. The proposed Rule 4 would authorize Alaska's federal court to assert jurisdiction by serving process on the defendant in Florida. The

²⁰¹ See 28 U.S.C. § 2072 (1982); note 4 *supra*.

²⁰² See Reporter's Draft, *supra* note 61, Rule 4(k), at 16 n.1, Advisory Committee Notes at 20.

²⁰³ One scholar has suggested that the rulemakers may lack authority to enact certain fundamental rules, such as a nationwide long-arm rule, not only by virtue of the Rules Enabling Act, but also by virtue of the constitutional separation of powers doctrine. See Whitten, *supra* note 14, at 103-06. The proposed mechanism for enacting the new Rule 4, with Congress's amending Title 28 to adopt the nationwide personal jurisdiction provision, bypasses not only the Rules Enabling Act obstacle, but also Professor Whitten's separation of powers obstacle as well.

²⁰⁴ Surprisingly, this provision is not discussed in the Advisory Committee Notes to the proposed amendments. It was, however, addressed in the notes to an earlier draft. See note 82 *supra*.

²⁰⁵ See Burbank, *supra* note 195, at 1106-07.

²⁰⁶ For a discussion of what result would follow if Congress, contrary to the rulemakers' wishes, fails to enact the desired provision, see note 83 *supra*.

²⁰⁷ A different policy attack might focus on the new rule's impact on the federal case load. The new rule would allow more assertions of personal jurisdiction and would thus allow more cases into the already overcrowded federal courts. However, the new rule would have a beneficial impact on judicial efficiency in two ways. It would assist courts in eliminating multiplicity of suits, see text accompanying notes 84-87 *supra*, and it would channel arguments regarding the forum selection doctrines, see text accompanying notes 8-18 *supra*. These efficiencies would counteract the docket control problem.

harassment value of a lawsuit in a distant forum bestows on the plaintiff a substantial bargaining edge in settlement negotiations, as the defendant may well respond more coldly to the prospect of litigating in Alaska than to acceding to the plaintiff's demands. To avoid the concomitant problems of unfairness and inconvenience, critics of the new rule may contend, the rulemakers should abandon the present Rule 4 proposal for nationwide personal jurisdiction.²⁰⁸

Moreover, their critique would run, these problems of unfairness and inconvenience are exacerbated by the recent amendment to the corporate venue statute.²⁰⁹ By linking venue to personal jurisdiction, that statute now eliminates venue as a protective filter for screening out cases involving corporations brought in patently inconvenient forums.²¹⁰ This new corporate venue statute, combined with a general nationwide service provision, would raise serious harassment concerns.²¹¹

These problems cannot be denied and should not be overlooked. If they cannot be alleviated, they provide good reason indeed to consider abandoning the proposed rule authorizing nationwide service in all federal question cases. To preserve the practical benefits promised by the new Rule 4,²¹² some method must be found to alleviate the above problems. In the following section, this Note discusses the filters through which would pass assertions of judicial authority under the new rule, filters that can strain out its potential ill effects.

III

A CONSTRUCTIVE RESPONSE: FILTERING OUT THE RULE'S ILL EFFECTS

Attacks on the proposed rule's constitutional and procedural validity should not succeed.²¹³ Nonetheless, there remains the potential for procedural unfairness. Plaintiffs could attempt to harass defendants by suing in inconvenient forums.²¹⁴ Fortunately, these ill effects can be screened out through the use of the three filters through which any forum choice must pass. Those filters are: (1) the due process limit on personal jurisdiction, (2) venue, and (3) forum non conveniens and venue transfer. As discussed above, for these doctrines to provide effective pro-

²⁰⁸ If the rulemakers do not abandon the proposal, the Supreme Court or Congress would still be empowered to reject it. See note 4 *supra*. Any policy attack on the proposed Rule 4 could thus be addressed to any of those bodies.

²⁰⁹ See 28 U.S.C.A. § 1391(c) (Supp. 1989).

²¹⁰ See notes 127-29 and accompanying text *supra*.

²¹¹ See note 130 *supra*.

²¹² See notes 84-94 and accompanying text *supra*.

²¹³ See notes 132-206 and accompanying text *supra*.

²¹⁴ See text accompanying notes 207-11 *supra*.

tection, they should operate independently of one another; where they overlap excessively,²¹⁵ each is less effective than it could be. The proposed rule will help to distinguish between personal jurisdiction, venue, and forum non conveniens concerns, making possible the more effective use of each doctrine.

Instead of wading through the current confused jumble of doctrines, all of which purport to effectuate the same values, courts will be able to say: Yes, we have *power* to adjudicate the rights of this defendant (personal jurisdiction), but as a matter of *sovereign prerogative* Congress has decided that this suit should not be heard in this particular location (venue),²¹⁶ or as a matter of *judicial discretion*, we think this suit should not be heard here (forum non conveniens and venue transfer).²¹⁷ Properly understood, these distinct doctrines would strain out most of the unfairness that might otherwise be engendered by plaintiffs choosing inconvenient federal forums pursuant to a rule providing nationwide service of process in all federal question cases.

A. Due Process

To say that a rule granting nationwide personal jurisdiction in all federal question cases is not per se unconstitutional is not to say that there is no constitutional limit on the application of that rule. The constitutional limit, however, is not the fourteenth amendment requirement of minimum contacts with the forum state.²¹⁸ Rather, the limit is the much looser fifth amendment requirement of minimum contacts with the United States as a whole.²¹⁹ Where a defendant's aggregate contacts

²¹⁵ For a discussion of the overlap and confusion inherent in current views of personal jurisdiction, venue, and forum non conveniens, see notes 13-18 and accompanying text *supra*.

²¹⁶ "Unlike personal jurisdiction issues, which primarily concern the extent of a court's power over the parties and the fairness of requiring a party to defend itself in a foreign forum," the Eleventh Circuit recently wrote, "venue primarily addresses the convenience of the forum." *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 857 (11th Cir. 1988) (citing *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979)). Venue provisions do not bespeak power. See *Neirbo Co. v. Bethlehem Shipbldg. Corp.*, 308 U.S. 165, 167-68 (1939). Unlike a default judgment entered without personal jurisdiction, one entered without proper venue is not generally susceptible to collateral attack. See *Restatement (Second) of Judgments* §§ 1, 4 comment h (1982).

²¹⁷ Forum non conveniens allows a court to decline to adjudicate a dispute where another forum would be substantially more convenient. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-09 (1947). See also *Vandergriff v. Southern Ry. Co.*, 537 So. 2d 904, 905 (Ala. 1988) (Torbert, C.J., dissenting) (discussing doctrine of forum non conveniens and its interplay with jurisdiction and venue).

²¹⁸ Some commentators advocate the use of this limit. See, e.g., Fullerton, *supra* note 71, at 38-60; Lusardi, *supra* note 30, at 32-33.

²¹⁹ See *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting); *FTC v. Jim Walter Corp.*, 651 F.2d 251, 256 (5th Cir. Unit A July 1981); *Fitzsimmons v. Barton*, 589 F.2d 330, 333 (7th Cir. 1979); *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974). But see *Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404, 408-09 n.5 (1987) (declining to

with the nation as a whole are negligible, the assertion of personal jurisdiction over that defendant would violate fifth amendment due process.²²⁰ The due process filter will thus take care of the potential unfairness of haling into a United States court someone who has had little or no contact with this country. Because this aggregate contacts test is easy to meet,²²¹ however, constitutional limits on personal jurisdiction will do relatively little to curtail the ill effects of the new rule.

In addition to this constitutional limitation, there is arguably another due process constraint on the location of suits. Where the inconvenience of the forum is so extreme that the defendant is effectively denied the ability to litigate, the defendant's due process right of an opportunity to be heard may be violated.²²² In other words, even if personal jurisdiction, understood as referring to the court's power over the defendant, is in itself proper and even if venue, as defined by the applicable statute, is also proper, the ultimate assertion of judicial authority in a very inconvenient forum could violate a defendant's due process rights under the fifth amendment. Notions of inconvenience alone, however, are more consonant with venue and forum non conveniens, which courts do not perceive as doctrines of constitutional dimension,²²³ than with personal jurisdiction. A constitutional requirement that focuses solely on convenience and raises no questions of power, even if accepted, would therefore be limited to the most egregious instances of inconvenient litigation.²²⁴

Under the nationwide service of process system, then, due process would screen out only the most egregious instances of unfairness. How-

address explicitly constitutionality of personal jurisdiction based on aggregate contacts with United States); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 n.* (1987) (same). On the distinction between the fifth and fourteenth amendments, see note 149 *supra*.

²²⁰ See, e.g., *Entek Corp. v. Southwest Pipe & Supply Co.*, 683 F. Supp. 1092, 1103 (N.D. Tex. 1988) (defendant Singapore venture capital corporation dismissed for want of personal jurisdiction due to lack of minimum contacts with United States).

²²¹ See, e.g., *Point Landing, Inc. v. Omni Capital Int'l*, 795 F.2d 415, 428 (5th Cir. 1986) (Wisdom, J., concurring in part and dissenting in part) (defendants lack minimum contacts with any particular state, but have substantial aggregate contacts with United States), *aff'd sub nom. Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404 (1987).

²²² See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478, 484 (1985); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223-24 (1957); *DeJames v. Magnificent Carriers*, 654 F.2d 280, 286 n.3 (3d Cir. 1981). Some courts, however, seem to reject even this small role for convenience to play in fifth amendment forum selection doctrine. See, e.g., *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671 (7th Cir. 1987) (defendant may not demand that court applying United States law in federal question case be conveniently located), *cert. denied*, 108 S. Ct. 1472 (1988).

²²³ See, e.g., *United States v. Scophony Corp.*, 333 U.S. 795 (1948) (venue); *Carlenstolpe v. Merck & Co.*, 819 F.2d 33 (2d Cir. 1987) (forum non conveniens); *Horne v. Adolph Coors Co.*, 684 F.2d 255 (3d Cir. 1982) (venue).

²²⁴ See *Burger King*, 471 U.S. at 477-78, 483-84.

ever, any residual unfairness left uncorrected by the filter of the due process clause could be largely eliminated through the vigorous use of venue principles.

B. Venue

Venue provisions restrict forum options in the interest of litigational convenience.²²⁵ Restrictive, defendant-oriented venue provisions would greatly diminish the potential unfairness of the proposed nationwide service rule.²²⁶

Generally, the federal venue statute²²⁷ protects defendants in federal question cases by limiting the locales in which suit may be brought to the districts where all defendants reside or where the claim arose.²²⁸ Thus, in most federal question cases brought against individual defendants, the current venue provision would protect adequately against unfairness. That venue protection, however, historically has been weaker for corporate defendants and recently became weaker still with the passage of a new corporate venue statute.²²⁹

By linking corporate venue to personal jurisdiction²³⁰ at a time when federal question personal jurisdiction may soon span the nation, the corporate venue amendment may unwittingly create nationwide venue. If the new Rule 4 becomes effective, then a federal question case involving a corporate defendant²³¹ properly could be brought in any United States district court.²³² The potential for harassment, inconvenience, and unfairness would be tremendous.²³³

For venue to serve effectively as a constraint on the unfairness of

²²⁵ See *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979); *Denver & R.G.W.R.R. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 560 (1967).

²²⁶ Indeed, the current venue provisions are the greatest limitation on the practical effects that adoption of the proposed Rule 4 would cause. See notes 122-31 and accompanying text *supra*.

²²⁷ 28 U.S.C. § 1391 (1982).

²²⁸ *Id.* § 1391(b).

²²⁹ "For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." 28 U.S.C.A. § 1391(c) (Supp. 1989).

Prior to the adoption of the 1988 amendment, the corporate venue statute read: "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." 28 U.S.C. § 1391(c) (1982) (amended 1988). See notes 127-30 and accompanying text *supra*.

²³⁰ See notes 127-29 and accompanying text *supra*.

²³¹ See note 129 *supra*.

²³² A corporate defendant would have no grounds to object to personal jurisdiction or venue. Such a defendant could, however, use *forum non conveniens* or venue transfer to attack the choice of forum. See notes 247-61 and accompanying text *infra*.

²³³ See note 130 *supra*.

forcing defendants to litigate in inconvenient forums, the corporate venue statute would have to be revamped. The linkage of venue and personal jurisdiction should not apply to federal question cases. Rather, the corporate venue provision for federal question cases should approximate more closely the general federal question venue statute.²³⁴ Corporate residence, for venue purposes, should be limited in federal question cases to those judicial districts in which the corporation is incorporated or doing business.²³⁵ Corporate defendants, like individual defendants, could then receive protection from the venue filter. Short of statutory amendment, this result could be achieved by thoughtful judicial interpretation of the new corporate venue provision. Congress certainly did not intend to create nationwide venue. To avoid such an unintended result, it would be appropriate for courts to construe "any judicial district in which [the corporation] is subject to personal jurisdiction" to mean any district in which the corporation would be subject to personal jurisdiction in the absence of any applicable nationwide service provision.

Restrictive, defendant-oriented venue provisions²³⁶ would not keep the new Rule 4 from achieving its practical and doctrinal benefits. The practical benefit of enabling plaintiffs to bring multiple defendants together in one court—where previously the defendants would not all have been amenable to that court's personal jurisdiction²³⁷—will still be achieved. Restrictive venue, so long as it allows a suit to be brought

²³⁴ 28 U.S.C. § 1391(b) (1982). See text accompanying notes 227-28 *supra*.

²³⁵ To avoid nationwide venue problems, perhaps the rulemakers should flag the conflict between the proposed Rule 4 and the new corporate venue statute in their prefatory Note. In addition to recommending that Congress amend 28 U.S.C. § 1331, see text accompanying notes 80-81 *supra*, the Note could recommend that Congress amend 28 U.S.C. § 1391(c). Rule 82 prohibits the rulemakers from extending or limiting venue, see text accompanying note 187 *supra*, but that should not preclude their giving appropriate advice.

In order to limit venue to those forums where defendants generally will not be unfairly inconvenienced, if § 1391(c) is amended as recommended, "doing business" could be construed in a manner congruent with cases interpreting the phrase under the pre-amended version of the corporate venue statute. See, e.g., *Maybelline Co. v. Noxell Corp.*, 813 F.2d 901, 904-05 (8th Cir. 1987) (interpreting "doing business" to mean "engaging in transactions . . . to such an extent and of such a nature that the state in which the district is located could require a foreign corporation to [comply with state registration law]") (citing *Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947 (1st Cir. 1984)); *Noxell Corp. v. Firehouse No. 1 Bar-B-Que Restaurant*, 760 F.2d 312, 317 n.7 (D.C. Cir. 1985) (same). But see 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3811 (Supp. 1989) (commenting on difficulty of interpreting "doing business," criticizing approach of *Johnson Creative Arts*, and lauding new linkage of personal jurisdiction and venue). Some have suggested defining "doing business" for § 1391(c) in terms of the systematic and continuous business activity required for general jurisdiction, as opposed to specific jurisdiction. See Letter from Judge Ruth Bader Ginsburg to Professor Charles Alan Wright (July 31, 1985) (on file at New York University Law Review); Note, *Defining "Doing Business" to Determine Corporate Venue*, 65 *Tex. L. Rev.* 153, 183 (1986).

²³⁶ E.g., 28 U.S.C. § 1391(b) (1982).

²³⁷ See notes 84-87 and accompanying text *supra*.

where the claim arose, would not hamper that objective. Likewise, restrictive venue would not interfere with the practical benefit of enabling plaintiffs to sue defendants who have sufficient aggregate contacts with the United States as a whole but lack significant contacts with any particular state.²³⁸ The proposed Rule 4's beneficial clarification of personal jurisdiction, venue, and forum non conveniens concerns would also be unaffected by defendant-oriented venue.

On the other hand, restrictive, defendant-oriented venue would guarantee defendants that the forum would not be unfairly inconvenient, even under nationwide service of process. If suit could be brought only where the defendant resides or where the cause of action arose,²³⁹ plaintiffs generally would be unable to choose forums for their harassment value.

Congress intended the nationwide service statutes,²⁴⁰ in part, to pinpoint particular substantive areas of federal law where broad forum options were felt particularly necessary.²⁴¹ The proposed Rule 4 would eliminate this concentration on specialized areas of law by making all federal laws equal for purposes of service of process.²⁴² Those necessary distinctions could be reinfused into federal law through the use of non-transsubstantive²⁴³ venue rules. These rules would establish appropriate venue requirements for different substantive areas of law. Such specialized venue provisions, based on a balancing of convenience and substantive policy concerns particular to each statutory field, would enable Congress to provide broader or narrower forum options as necessary. Where it is considered of utmost importance to hale the defendant into federal court at the location of the plaintiff's choosing, nationwide service of process could be combined with a plaintiff-oriented venue provision.²⁴⁴ Conversely, where Congress is concerned that defendants not be

²³⁸ See notes 88-90 and accompanying text *supra*.

²³⁹ See 28 U.S.C. § 1391(b) (1982).

²⁴⁰ For a listing of statutes that include nationwide service provisions, see note 30 *supra*.

²⁴¹ See Sinclair, *supra* note 34, at 1243.

²⁴² See Proposed Amendments, *supra* note 6, Rule 4(I), at 15-16.

²⁴³ See note 264 *infra*.

²⁴⁴ Especially relevant here would be plaintiff venue, i.e., venue in the district where the plaintiff resides. See, e.g., 28 U.S.C. § 1391(a) (1982) (proper venue in diversity cases includes plaintiff venue). Such a combination of nationwide service and plaintiff-oriented venue is provided for in mandamus actions against federal employees. 28 U.S.C. § 1391(e) (1982) (combining nationwide service of process with proper venue wherever "(1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) *the plaintiff resides* if no real property is involved in the action") (emphasis added).

Assertions of authority in very inconvenient forums pursuant to such a combination of nationwide service and liberal venue, however, may risk running afoul of the due process clause in extreme cases. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478, 484 (1985) (finding no due process violation but recognizing potential problem); *McGee v. International*

inconvenienced, nationwide service of process can be coupled with a particularly restrictive statutory venue provision.²⁴⁵

Many nationwide service statutes carry with them restrictive venue provisions to avoid excessive inconvenience.²⁴⁶ Congress considers venue a necessary and appropriate method for curtailing the harmful impact of the substantively narrow nationwide service statutes now in existence. In the same manner, venue should also be used to curtail the impact of the much broader nationwide service provision proposed for Rule 4. Indeed, venue restrictions provide the most significant limitation on the potential unfairness engendered by a general federal question nationwide service rule.

Venue provisions, though, are limited in that they are nondiscretionary. A legislature enacting a venue statute cannot consider the peculiar facts of a case at hand. Rather, a legislature must try to predict which locales will be convenient and appropriate for hearing certain general types of cases. Venue restrictions, therefore, inevitably fail to screen out some of the instances in which a plaintiff's chosen forum would be unfair to the defendant. The fine-tuning necessary for eliminating forum selection unfairness case by case must come from more discretionary doctrines: forum non conveniens and venue transfer.

C. *Forum Non Conveniens and Venue Transfer*

Forum non conveniens is the common law's tool for reducing unfairness occasioned by plaintiff's choice of forum.²⁴⁷ Under this discretionary doctrine, a court may dismiss a suit if a more appropriate forum exists.²⁴⁸ To a greater degree than personal jurisdiction or even venue, forum non conveniens concerns itself with the convenience of the parties.²⁴⁹ For that reason, the doctrine should be included in the list of

Life Ins. Co., 355 U.S. 220, 223-24 (1957) (same); text accompanying notes 222-24 *supra*.

²⁴⁵ Such a venue provision might, for instance, allow suits to be brought only in the district where the defendant is domiciled.

²⁴⁶ See, e.g., Clayton Act, 15 U.S.C. § 22 (1982) (venue in antitrust action against corporation proper where defendant "is an inhabitant, . . . may be found or transacts business"); Securities Act of 1933, 15 U.S.C. § 77v(a) (Supp. V 1987) (venue proper where "defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein").

²⁴⁷ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-09 (1947); *R. Casad*, *supra* note 5, § 4:23.

²⁴⁸ *Gulf Oil*, 330 U.S. at 507-09.

²⁴⁹ Personal jurisdiction and venue, to the extent they implicate convenience concerns, use state or district lines as a proxy for convenience. Such boundaries serve inadequately as a proxy because they ignore the crucial difference between, for example, Massachusetts-Rhode Island and Massachusetts-Arizona. Moreover, to use such boundaries as a proxy is to fail to recognize that one defendant may suffer no inconvenience in crossing a nearby state line, while another defendant may suffer substantial inconvenience in being dragged across a large state. See *Stein*, *supra* note 13, at 791-92. State lines do not measure decisively the time and trouble

devices for curtailing the ill effects of a nationwide jurisdiction rule.

Closely related to forum non conveniens is venue transfer.²⁵⁰ Indeed, the federal venue transfer statute²⁵¹ has been called a federal codification of the doctrine of forum non conveniens.²⁵² Under that statute, a federal district court may transfer a case to another district "[f]or the convenience of parties and witnesses, in the interest of justice."²⁵³ The primary difference between forum non conveniens and venue transfer is that under the former, a suit is dismissed,²⁵⁴ whereas under the latter, a suit is not dismissed but rather transferred to another district.²⁵⁵

One criticism of the new Rule 4 is that it would allow the assertion of personal jurisdiction over a defendant in an unfairly inconvenient forum. If, in such a case, the limitations of due process and venue fail to preclude the plaintiff's choice of forum, forum non conveniens or venue transfer should be used to overcome this unfairness. By changing a suit's location pursuant to section 1404(a), or by dismissing it on the ground of forum non conveniens, a court can counter the potential for unfairness inherent in the Rule 4 proposal. If a plaintiff chooses an inconvenient forum for its harassment value,²⁵⁶ then the defendant may be able to show that another forum is more appropriate.

In fact, the doctrine of forum non conveniens may be strengthened by the new rule. First, there will be a greater need for forum non conveniens dismissals, because personal jurisdiction in distant forums will be easier to obtain.²⁵⁷ Second, by helping to clarify the purposes of each of the forum selection doctrines, the new rule will give each of the protective doctrines, including forum non conveniens and venue transfer, more

involved in traveling from place to place. Rather, actual inconvenience must be measured by considering absolute distance, travel routes, and geographic remoteness, and perhaps the identity of the defendant as well. The doctrine of forum non conveniens frankly focuses on the actual inconvenience to all those involved. See R. Casad, *supra* note 5, § 1:07.

²⁵⁰ See R. Casad, *supra* note 5, § 4:26.

²⁵¹ 28 U.S.C. § 1404(a) (1982).

²⁵² See *id.* § 1404(a) annot. (historical & revision notes). One commentator calls this "a creative bit of retroactive legislative history," because the transfer provision had been proposed several years before the Supreme Court's adoption, in *Gulf Oil*, 330 U.S. at 504-05, of forum non conveniens for the federal courts. Stein, *supra* note 13, at 807.

²⁵³ 28 U.S.C. § 1404(a) (1982). The transferee district must be one "where [the action] might have been brought." *Id.* See *Hoffman v. Blaski*, 363 U.S. 335, 343-44 (1960).

²⁵⁴ See *Gulf Oil*, 330 U.S. at 507. A federal court would dismiss an action rather than transfer venue where the more convenient forum is not another federal district, but rather a state court or a court of another country. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260 (1981) (suit dismissed on grounds of forum non conveniens because more convenient forum was in Scotland); *Gross v. Owen*, 221 F.2d 94, 96 (D.C. Cir. 1955) (suit dismissed on grounds of forum non conveniens because more convenient forum was Maryland state court).

²⁵⁵ See 28 U.S.C. § 1404(a) (1982).

²⁵⁶ See text accompanying note 207 *supra*.

²⁵⁷ See text accompanying notes 84-87 *supra*.

"bite." Once it is clear, as a doctrinal matter, that personal jurisdiction determines not that the forum is a convenient one but only that the court has power over the parties, and that convenience is to be addressed by the protective doctrines of venue, forum non conveniens, and venue transfer, courts will employ more effectively those protective doctrines to screen out genuinely inconvenient forums.

One problem with depending on forum non conveniens and venue transfer to protect defendants from the unfairness of being forced to litigate in inconvenient forums, however, is that those doctrines rely heavily on judicial discretion.²⁵⁸ As such, they are both less predictable and more difficult to overturn on appeal²⁵⁹ than less discretionary doctrines such as venue.²⁶⁰ Nonetheless, by letting such factors as convenience of parties, convenience of witnesses, state interest, and availability of evidence weigh against a plaintiff's choice of forum,²⁶¹ forum non conveniens and venue transfer help to put the defendant on a more equal footing with the plaintiff.

In sum, a constructive response can overcome the proposed rule's ill effects, namely, the inconvenience and unfairness that can result from a plaintiff's harassment-motivated choice of a distant forum. Such a response would not oppose the rule as a whole, but rather would address its undesired effects. As has been demonstrated, existing procedural doctrines can achieve this goal. Federal practice has developed three filters—due process, venue, and forum non conveniens and venue transfer—through which a choice of forum must pass. Properly utilized, these filters allow defendants to overcome much of the potential unfairness inherent in the proposed rule by diverting cases from inappropriate forums. Due process would eliminate some unfair forum selections, but is limited to the most egregious cases. Venue, as long as it is defendant-oriented, precludes many more potentially inconvenient forum choices. Finally, where the facts of a particular case show that the forum chosen by the plaintiff is plainly inferior to another option, despite proper personal jurisdiction and venue, the discretionary doctrines of forum non conveniens and venue transfer can strain out the inferior choice.

²⁵⁸ See *Piper Aircraft*, 454 U.S. at 257; Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 749-54 (1982); Stein, *supra* note 13, at 785.

²⁵⁹ See *Piper Aircraft*, 454 U.S. at 257; Stein, *supra* note 13, at 785.

²⁶⁰ See generally Stein, *supra* note 13 (criticizing excessive dependence on forum non conveniens).

²⁶¹ For the most widely cited list of factors to be considered, see *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

IV

BEYOND A NEW RULE 4

The new Rule 4 would bring both practical advantages²⁶² and disadvantages,²⁶³ and should engender practical responses to minimize its problems while maintaining its benefits. There is something particularly fundamental, however, about a rule providing for nationwide personal jurisdiction in all federal question cases. A discussion of the new rule should therefore address more than the rule's practicalities; it should address the rule's implications for the future direction of civil procedure doctrine.

A. A More Rational Transsubstantiveness

The new rule carries implications for how rules of civil procedure ought to be structured. Attacking transsubstantive rules²⁶⁴ is all the rage among proceduralists these days.²⁶⁵ One set of federal rules of civil procedure, critics contend, inadequately addresses the widely varying procedural concerns inherent in different substantive areas of law.²⁶⁶ A future shift in civil procedure may well be away from transsubstantive rules and towards rules that vary with the category of substantive law. Why, then, would the federal rulemakers choose to make nationwide service of process—heretofore available only in discrete substantively defined areas—available transsubstantively?

Perhaps it is too simplistic to define the trend merely as a shift away from transsubstantive rules. Rather, the trend should be seen as a shift toward more *rational* transsubstantiveness. Viewed in this light, the rulemakers' proposal makes sense. Personal jurisdiction, a largely constitutional matter of power over people, should be applied consistently across different areas of law, so long as the sovereign power remains the

²⁶² See text accompanying notes 84-95 *supra*.

²⁶³ See text accompanying notes 207-11 *supra*.

²⁶⁴ "Transsubstantive" rules are rules that apply across all substantive areas of law, as opposed to "specialized" or "nontranssubstantive" rules, which apply only to specifically defined areas of law. The current federal rules of civil procedure are transsubstantive.

²⁶⁵ See, e.g., Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 Notre Dame L. Rev. 693, 716-17 (1988); Resnick, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494, 527-28 (1986); Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. Pa. L. Rev. 2131, 2175-78 (1989); Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. Pa. L. Rev. 1999, 2042-43, 2048-51 (1989). But see Carrington, *supra* note 4, at 2068-69 (arguing that critique on transsubstantive rules is misguided); Hazard, *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. Pa. L. Rev. 2237, 2244-47 (1989) (same).

²⁶⁶ See Burbank, *supra* note 265, at 716-17; Resnick, *supra* note 265, at 527-28; Subrin, *supra* note 265, at 2048-51.

same. Venue, on the other hand, is a matter of sovereign prerogative.²⁶⁷ Therefore, venue need not be treated equivalently across those substantive legal areas, but rather should be used to accommodate varying substantive policy concerns. Instead of providing nationwide personal jurisdiction only for specific statutory areas, it makes more doctrinal sense to provide it for all federal question cases, and to limit its impact with a generally applicable, restrictive venue statute and broader or narrower substance-specific venue provisions where needed to further particular policies.²⁶⁸

This inclination toward a more rational transsubstantiveness, embodied in the new rule, goes hand in hand with the disentangling of the doctrines of personal jurisdiction, venue, and *forum non conveniens*.²⁶⁹ With personal jurisdiction properly linked to the power of the sovereign that created the court,²⁷⁰ these doctrines can be understood and applied in keeping with the particular values they are intended to further. In the case of personal jurisdiction, the doctrine is best applied transsubstantively, since the power of a federal court over a given defendant in a federal question case should not vary depending on which particular federal statute is at issue.²⁷¹ Venue requirements, on the other hand, are best constructed only partly transsubstantively. While a generally applicable federal question venue statute may ensure appropriate forums for most cases, the policies underlying some federal statutes may be better served by specialized venue provisions allowing broader²⁷² or narrower²⁷³ forum options. Finally, *forum non conveniens* and venue transfer are rationally viewed as the least transsubstantive of all, since those doctrines are properly applied on a discretionary, case-by-case basis.²⁷⁴

²⁶⁷ See *FTC v. Jim Walter Corp.*, 651 F.2d 251, 257 (5th Cir. Unit A July 1981) ("When minimum contacts exist with the relevant sovereign, due process no longer protects a defendant from distant litigation because the location of permissible venues is a matter of sovereign prerogative."); Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77, 109 (venue is matter of sovereign prerogative, not of constitutional due process).

²⁶⁸ If nationwide service were to be combined with plaintiff venue, however, some assertions of judicial authority in extremely inconvenient locations could violate, by their very inconvenience, the due process clause of the fifth amendment. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477, 484 (1985); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223-24 (1957); notes 222-24 and accompanying text *supra*.

²⁶⁹ See text accompanying notes 215-17 *supra*.

²⁷⁰ See *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting); text accompanying notes 149-60, 216-17 *supra*.

²⁷¹ See text accompanying notes 149-60 *supra*.

²⁷² See text accompanying note 244 *supra*.

²⁷³ See text accompanying note 245 *supra*.

²⁷⁴ See text accompanying notes 258-60 *supra*.

B. *A More Rational Vision of Federal Courts*

The new rule also carries implications for how the federal court system is perceived. Rule 4's present requirement that federal courts generally mimic state courts for purposes of service of process encourages a perception that a federal court is not fundamentally different from a state court, but merely another courthouse, which exercises the same power as a court of the state in which the federal court sits. This perception is strongest where the federal court is hearing a diversity case,²⁷⁵ but the perception encouraged by Rule 4 applies equally where the federal court is hearing a federal question case. This is because service of process under the current Rule 4 generally must conform with state limitations even in federal question cases.²⁷⁶

It should be recognized that the federal judiciary serves a purpose distinct from that of the state judiciaries.²⁷⁷ Implications to the contrary, such as those inherent in the current Rule 4, strain our perception of the very structure of the United States federal system.²⁷⁸ Dissenting from the Fifth Circuit's opinion in the *Omni* case, Judge Wisdom wrote, "The majority's conclusion [rejecting nationwide service of process in a private action under the federal Commodity Exchange Act] does violence to the structure of the American polity. A federal court's service arm in a federal question case should not be handcuffed to the place of the court's seat."²⁷⁹

The proposed rule, by allowing federal but not state courts²⁸⁰ to serve process nationwide, properly treats federal courts differently from state courts. It thus takes one step toward a more rational view of the federal court system. But it is only one step. The new rule would provide nationwide personal jurisdiction in federal question cases, but not in

²⁷⁵ See *Point Landing, Inc. v. Omni Capital Int'l*, 795 F.2d 415, 427-28 (5th Cir. 1986) (Wisdom, J., concurring in part and dissenting in part) (distinguishing diversity action, in which federal court sits as state court and there is therefore good reason to follow *International Shoe*, from federal question case, in which no such reason exists), *aff'd sub nom. Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404 (1987).

²⁷⁶ See text accompanying notes 21-25 *supra*.

²⁷⁷ Cf. A. de Tocqueville, *Democracy in America* 147 (J. Mayer ed. 1969). In his chapter entitled "Procedure of the Federal Courts," Tocqueville comments on the need, in a federal system, to counteract the natural weakness of the federal judiciary: "The lawgiver in a confederation must constantly strive to give the courts a standing analogous to that of those in nations which have not divided sovereignty; in other words, his constant efforts must be bent toward making federal justice represent the nation." *Id.*

²⁷⁸ Cf. *FTC v. Jim Walter Corp.*, 651 F.2d 251, 255 (5th Cir. Unit A July 1981) (rejecting argument that nationwide service of process violates due process when defendant lacks minimum contacts with district because argument ignores important differences between state and federal jurisdiction).

²⁷⁹ *Point Landing*, 795 F.2d at 428 (Wisdom, J., concurring in part and dissenting in part).

²⁸⁰ For a discussion of the interplay between nationwide service of process and concurrent jurisdiction, see note 290 *infra*.

cases where subject matter jurisdiction is based on diversity of citizenship.²⁸¹ This sharp differentiation between federal question and diversity cases may oversimplify the concerns that should underlie grants of nationwide personal jurisdiction. Viewed in light of the essential difference between state and federal courts, the key question should not be whether subject matter jurisdiction is based on a federal question, but whether the court is fulfilling some distinctly federal function—that is, whether the court is “acting federally.”²⁸²

A bill recently considered by Congress illustrates this “acting federally” approach to determining what types of actions warrant nationwide service of process. The section of the Court Reform and Access to Justice Act of 1988 subtitled “Multiparty, Multiforum Jurisdiction” proposed the creation of a new type of original jurisdiction in the federal courts.²⁸³ Federal jurisdiction would be created to solve some of the problems of dispersed and complex litigation.²⁸⁴ The proposed jurisdictional grant was to provide “a consolidated adjudication of liability in mass tort cases involving dispersed parties.”²⁸⁵

Although the multiparty, multiforum jurisdictional grant was not to be based on the presence of any federal question, but rather on diversity of citizenship,²⁸⁶ its function was distinctly federal—in the words of the House Report, “a valuable function for which the Federal judicial forum would be uniquely suited.”²⁸⁷ The bill proposed nationwide service of

²⁸¹ Interpleader cases are the sole exception. See note 71 and accompanying text *supra*.

²⁸² Some types of cases in which federal subject matter jurisdiction is based on diversity of citizenship have been subjects of proposals for nationwide service of process. See, e.g., notes 283-89 and accompanying text *infra* (multiparty, multiforum jurisdiction); Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. Rev. 1061, 1097 (1985) (certain cases involving indispensable parties); H.R. 3662, 100th Cong., 1st Sess. § 1 (1988) (products liability cases involving foreign defendants). Nationwide service of process for interpleader, the jurisdictional grant of which is premised on diversity of citizenship, see R. Casad, *supra* note 5, at § 3:27, is well established. See note 71 *supra*.

²⁸³ See H.R. 4807, 100th Cong., 2d Sess. § 301 (1988). Representative Kastenmeier recently reintroduced the idea to the House in a bill entitled the “Multiparty, Multiforum Jurisdiction Act of 1989.” H.R. 3406, 101st Cong., 1st Sess. (1989). For scholarly articles proposing such jurisdiction, see Miller & Crump, *Jurisdiction and Choice of Law in Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 75-78 (1986); Rowe & Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. Pa. L. Rev. 7 (1986).

²⁸⁴ See H.R. 4807, 100th Cong., 2d Sess. § 301 (1988); H.R. Rep. No. 889, 100th Cong., 2d Sess. 37 (1988).

²⁸⁵ H.R. Rep. No. 889, 100th Cong., 2d Sess. 43 (1988).

²⁸⁶ The proposed jurisdiction would have required only minimum diversity, H.R. 4807, 100th Cong., 2d Sess. § 301 (1988), rather than maximum diversity as required under 28 U.S.C. § 1332, see *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). The constitutional jurisdictional grant that makes possible the proposed jurisdiction is nonetheless that of diversity jurisdiction, see U.S. Const. art. III, § 2; H.R. Rep. No. 889, 100th Cong., 2d Sess. 39 (1988), since the Constitution requires only minimum diversity, see *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-31 (1967).

²⁸⁷ H.R. Rep. No. 889, 100th Cong., 2d Sess. 38 (1988). The Report proceeds to explain

process for this new type of action²⁸⁸ to facilitate its uniquely federal function.²⁸⁹

The merits of the multiparty, multiforum jurisdiction bill are beyond the scope of this Note. But this brief discussion shows the relevance of the federal judiciary's uniqueness²⁹⁰ to questions of nationwide service of process. In those types of actions where the federal courts act in a peculiarly federal way, it is important that they be perceived as different from state courts in order to fulfill their uniquely federal function.

Just as bringing together a mass tort case into one forum would be a uniquely federal function, so is enforcing federal law with vigor and national uniformity. Federal courts in federal question cases are acting federally, in this sense. Nationwide personal jurisdiction helps the courts to fulfill their uniquely federal function in such cases.

The new Rule 4's bright line between federal question and diversity cases may be too simplistic a vision of when federal courts are truly "acting federally." The new rule, therefore, may not go far enough in treating federal courts differently from state courts for purposes of personal jurisdiction. But the proposal indicates a more rational vision than that suggested by the current Rule 4, which fails to treat federal courts dis-

that the proposed jurisdiction "is not an invasion of the domain of state courts but rather a focused use of the Federal judicial forum to employ its unique capabilities to deal with dispersed, related actions." *Id.* An important aspect of the federal judiciary's "unique" ability to manage the problem of multiparty, multiforum litigation is its ability, through nationwide service, to "bring scattered parties together in one forum . . ." *Id.* at 37.

²⁸⁸ H.R. 4807, 100th Cong., 2d Sess. § 304 (1988). As reintroduced, see note 283 *supra*, the bill still proposes nationwide service of process. See H.R. 3406, 101st Cong., 1st Sess. § 7 (1989).

²⁸⁹ H.R. Rep. No. 889, 100th Cong., 2d Sess. 37-38 (1988).

²⁹⁰ In many federal question areas, the federal and state courts share concurrent jurisdiction. See R. Casad, *supra* note 5, § 3:24. Most of the current nationwide service provisions, however, pertain to cases in which federal subject matter jurisdiction is exclusive. Thus the potentially wider range of process in federal courts rarely results in forum shopping between the federal and state courts. See *id.* § 6:02.

The interplay between nationwide service and concurrent jurisdiction would become more significant should the new Rule 4 be enacted. In a case in which a federal court would be empowered to employ nationwide service of process, a state court with concurrent jurisdiction would not be similarly empowered, even if the authorization for nationwide service came not from Rule 4, but rather from a federal statute that the state court is enforcing. See *Lakewood Bank & Trust Co. v. Superior Court*, 129 Cal. App. 3d 463, 470-71, 180 Cal. Rptr. 914, 918 (1982).

The new disparity in range of process between state and federal courts could put a new twist in the lawyerly pastime of forum-shopping. Plaintiffs could choose federal forums in order to avail themselves of the broader federal service of process. "Forum-shopping" is generally a pejorative term. See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (advocating "discouragement of forum-shopping"). In this context, however, it simply refers to the practical benefits the new rule seeks to achieve—enabling plaintiffs to bring defendants together in one forum and allowing assertions of jurisdiction over otherwise unavailable alien defendants. See text accompanying notes 84-90 *supra*.

tinctly even in federal question cases. The nationwide personal jurisdiction provision of the new Rule 4 takes one major step towards a more coherent view of the role of federal courts.

CONCLUSION

Amendments to Rule 4 currently under consideration by the federal rulemakers would authorize nationwide personal jurisdiction in all federal question cases. The new rule would be beneficial and a legitimate exercise of the rulemakers' power.

The new Rule 4's practical impact would be more limited than one might expect, as a result of venue limitations. The rule would nonetheless confer substantial benefits, including litigational efficiency, expanded federal regulatory power, and a decrease in the comparative disadvantage domestic corporations face in international trade competition.

Constitutional challenges to the rule's legitimacy fail. Such challenges are based on a faulty analogy between state and federal court personal jurisdiction; they assume incorrectly that "fairness" in the jurisdictional sense refers solely to convenience. Likewise, procedural challenges fail. Expansion of personal jurisdiction is a valid exercise of the rulemakers' authority. Moreover, the rulemakers have allayed any residual procedural fears by encouraging Congress to give the new rule express assent in the form of a legislative enactment.

Still, the rule's potential for unfairness demands attention. Plaintiffs' counsel will be all too eager to sue in forums deliberately inconvenient to defendants, hoping to tilt the scales of settlement with the weight of harassment. Therefore, to avoid unfairness, the rule's impact must be curtailed by an overlay of defendant-oriented venue provisions and by the vigorous employment of *forum non conveniens* and venue transfer. The use of these restrictive court access doctrines would be facilitated by the new rule, because the new rule would help disentangle the doctrines of personal jurisdiction, venue, and *forum non conveniens*. By clarifying the functions of these doctrines, the new Rule 4 would enhance their impact. Thus, perhaps counterintuitively, this rule permitting nationwide service of process may actually decrease unfairness and inconvenience to defendants.

Looking beyond the rule's practicalities, such a broadly applicable nationwide service provision carries important implications for the direction of civil procedure doctrine. The rulemakers' decision to make nationwide service of process available transsubstantively, at a time when the general trend in procedure is away from transsubstantive rules, suggests an acceptance of selective, rational transsubstantiveness. The decision to make nationwide service available in all federal question cases,

but not in diversity cases, indicates a first step toward a more rational vision of the role of federal courts in our federal system.